No. 111 Original

Supreme Court, U.S.
FILED
FEB 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE COMPLAINT, COMPLAINT, AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, COUNSEL OF RECORD
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Plaintiff
The State of Delaware

February 9, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
MOTION FOR LEAVE TO FILE COMPLAINT	ii
COMPLAINT	1
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT	13
EXHIBITS	29
EXHIBIT A—DELAWARE ESCHEAT LAW	29
EXHIBIT B—NEW YORK ESCHEAT LAW	42
EXHIBIT C—RELEVANT EXCERPTS OF THE NEW YORK ABANDONED PROPERTY LAW HANDBOOK FOR BROKERS AND DEALERS	64
PROOF OF SERVICE	76

No. ———— Original

———o———

In The

Supreme Court of the United States

October Term, 1987

———o———

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

———o———

MOTION FOR LEAVE TO FILE COMPLAINT

———o———

The State of Delaware, by its counsel, hereby moves the Court for leave to file the attached Complaint against the State of New York.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, COUNSEL OF RECORD
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Plaintiff
The State of Delaware

No. ———— Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

COMPLAINT

The State of Delaware, plaintiff, by its counsel, brings this original action against the State of New York, defendant, and alleges as follows:

I.

1. The plaintiff, the State of Delaware ("Delaware"), and the defendant, the State of New York ("New York"), are states of The United States.

2. This is a controversy between two states of The United States and is, therefore, within the original jurisdiction of the Supreme Court of The United States, under Article III, Section 2 of the Constitution of The United States, and under the United States Code, Title 28, Section 1251(a).

3. This controversy concerns the wrongful escheating or threat to escheat by New York, from corporations

incorporated under the laws of Delaware engaged in the securities brokerage business (the "Delaware Brokerage Corporations"), of monies and other intangible property. The Delaware Brokerage Corporations had or have such property as the result of distributions made with respect to securities held or formerly held for the account of customers but as to which the brokers have no identification or last known address of anyone claiming to be the beneficial owner of such property (the "Escheatable Property of Unknowns").

4. Delaware claims herein that, under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), the Escheatable Property of Unknowns is properly escheatable not to New York but to Delaware, pursuant to its Escheat Law. Del. Code Ann. tit. 12, §§ 1197-1211 (1987) (the "Delaware Escheat Law"). Delaware seeks herein (a) a judgment that New York pay to Delaware the Escheatable Property of Unknowns taken by New York and (b) a prospective declaration that Delaware has the right in the future to escheat the Escheatable Property of Unknowns from the Delaware Brokerage Corporations without further interference or competing claims from New York.

5. No other state has been joined as a defendant in this action because Delaware is not aware of any state which is asserting a right which may be contrary to the claim being asserted herein by Delaware. However, Delaware has, upon the filing of the Motion for Leave to File Complaint, mailed a copy of the Motion, the Complaint and the Brief in Support of Motion for Leave to File Complaint, to each of the other states, in order that any other state which might believe it has some claim to the Escheat-

able Property of Unknowns may seek leave of this Court to intervene in these proceedings.

6. None of the Delaware Brokerage Corporations which had or have Escheatable Property of Unknowns has been joined as a defendant in this action, because such entities (a) have no claim as to the Escheatable Property of Unknowns and (b) are held harmless by New York from any competing claims to the Escheatable Property of Unknowns taken by New York. (N.Y. Abandoned Property Law § 1404 (McKinney Supp. 1988)).

II.

7. The Delaware Brokerage Corporations include the following (and their predecessors):

Bear, Stearns & Co. Inc.

Dean Witter Reynolds Inc.

Donaldson, Lufkin & Jenrette Securities Corporation

Drexel Burnham Lambert Incorporated

The First Boston Corporation

Kidder, Peabody & Co. Incorporated

Merrill Lynch, Pierce, Fenner & Smith Incorporated

Morgan Stanley & Co. Incorporated

Oppenheimer & Co., Inc.

PaineWebber Incorporated

Prudential-Bache Securities Inc.

Salomon Brothers Inc.

Shearson Lehman Hutton Inc.

Smith Barney, Harris Upham & Co. Incorporated

Thomson McKinnon Securities Inc.

Each of the Delaware Brokerage Corporations has offices and conducts business in New York, as well as in other states of The United States.

8. The Delaware Brokerage Corporations, in the course of their business, act as record owners of securities, primarily stocks and bonds, the beneficial ownership of which is in the account of customers of the Delaware Brokerage Corporations. As record owners, the Delaware Brokerage Corporations from time to time receive distributions with respect to the securities, such as dividends and interest (the "Payments"). As the Payments are received, the Delaware Brokerage Corporations regularly allocate to the accounts of their customers the Payments to which they are beneficially entitled.

9. In certain instances, however, the Delaware Brokerage Corporations are unable to identify the beneficial owners of the Payments. For example, a Delaware Brokerage Corporation may sell in the open market a customer's securities and the ultimate acquiror in the market of those securities thereafter may fail to remove that Delaware Brokerage Corporation as the record owner of such securities before the record date on which a Payment becomes payable to that Delaware Brokerage Corporation. Unless a claim to pay over such Payment is made by the ultimate acquiror of such securities, that Delaware Brokerage Corporation will not know who the beneficial owner of such Payment is or what the address is for such beneficial owner. Accordingly, where no claim to pay over the Payments is made, the Delaware Brokerage Corporation has Escheatable Property of Unknowns.

III.

10. Since at least July 13, 1971, Delaware has provided, by the Delaware Escheat Law, for the escheat of personal property of every kind or description, including the Escheatable Property of Unknowns, held by every legal entity incorporated under Delaware law, including the Delaware Brokerage Corporations, having possession, custody or control of such property, where such property has remained unclaimed by its beneficial owner for a period of seven years. Delaware Escheat Law § 1198(6), (8) and (10). The Delaware Escheat Law is set forth in Exhibit "A", attached to the Brief in Support of Motion for Leave to File Complaint, attached hereto.

IV.

11. Notwithstanding the Delaware Escheat Law, and Delaware's right thereunder to escheat the Escheatable Property of Unknowns in the hands of Delaware Brokerage Corporations, New York has continued to claim and to seize such property, which rightfully belongs to Delaware.

12. Effective April 1, 1952, the State of New York adopted a provision entitled "Unclaimed Property Held by Brokers." Article V-A of the New York Abandoned Property Law §§ 510-514 (McKinney Supp. 1988) (the "New York Escheat Law"). The New York Escheat Law provides for the escheat of personal property, including the Escheatable Property of Unknowns, held by any corporation engaging in New York in the purchase, sale or exchange of securities for or on behalf of any customers. Unlike the Delaware Escheat Law, which

requires property to be abandoned for seven years before its escheat, the New York Escheat Law provided for escheat after five years until December 31, 1975, when the dormancy period was further reduced to three years. *See generally id.* §§ 510(4) and (5), 511, as amended by 1973 N.Y. Laws c.617, § 6. The New York Escheat Law is set forth in Exhibit "B", attached to the Brief in Support of Motion for Leave to File Complaint, attached hereto.

13. New York publishes and disseminates to securities brokers, including the Delaware Brokerage Corporations, a publication entitled "Abandoned Property Law Handbook for Brokers and Dealers" ("Handbook"), which states that it was "published to inform brokers and dealers in securities concerning their responsibilities under Article V-A." Relevant excerpts from the Handbook are set forth in Exhibit "C", attached to the Brief in Support of Motion for Leave to File Complaint, attached hereto.

14. The Handbook sets forth the statutory language of Article V-A, and makes clear New York's position that the escheat to it of abandoned property includes Payments where they are attributable to beneficial owners who "cannot be identified," *See, e.g.*, Exhibit "C" at p. 71, ¶ 1 ("The unpaid amounts in category (a) [of Section 511.1] often occur when the broker or dealer ceases to hold the security at the time of receipt of the dividend or bond interest, the security having already been traded, and *the persons or customers entitled to such payment cannot be identified (unknown).*"—emphasis supplied); *id.*, ¶ 2 ("The unpaid amounts in category (a) [of Section 511.1-a] often occur when the broker or dealer receives

dividend or bond interest other than from a dividend disbursing agent, but rather from another broker or dealer as a result of an overpayment, and *the persons or customers entitled to such payment cannot be identified (unknown).*" —emphasis supplied); and p. 73, ¶ 4 ("*This class of unclaimed property* [*covered by Section 511.3*] *generally results from an inability to identify the owner of the security,* to locate the owner of a dormant customer account or to have a customer accept delivery of his securities or amounts paid thereon to which he is entitled. The unknown owner situation often occurs as discussed in subparagraph 1 above when a stock dividend is received by the broker or dealer after the underlying security had already been traded and delivered."—emphasis supplied)

15. The Handbook further provides that Payments received by a broker in New York, including the Delaware Brokerage Corporations, are escheatable to New York even when not attributable to the account of a New York customer:

> [I]tems received as the holder of record of a security which a broker or dealer ceased to actually hold prior to receipt of the item, are deemed abandoned property (if unpaid to the entitled customer for three years) if received in this state, without regard to the location of the office in which the original transaction in respect to the security may have occurred. (Sec. 510, Subd. 6, par. b and Sec. 511, Subd. 1)

Id., p. 75, ¶ 6.

V.

16. From before 1971 up to the present time, New York has demanded from the Delaware Brokerage Corporations all of the Escheatable Property of Unknowns after the running of the three or five year dormancy period pro-

vided for under the New York Escheat Law. Most of the Delaware Brokerage Corporations have acceded to New York's demands to pay over the Escheatable Property of Unknowns and, accordingly, Delaware, after the running of its seven year dormancy period, has been refused payment of the Escheatable Property of Unknowns on the basis that such property has already been paid over to New York, and in reliance on a representation contained in the General Provisions of the New York Escheat Law that New York will hold harmless any entity in respect of subsequent claims made on property escheated to New York. New York Escheat Law § 1404 (McKinney Supp. 1988) (attached to the Brief in Support of Motion for Leave to File Complaint as part of Exhibit "B" thereto).

17. Plaintiff is aware of only three of the Delaware Brokerage Corporations which to date have challenged New York's claim to the Escheatable Property of Unknowns.

18. In the early 1980's, PaineWebber Incorporated ("PaineWebber"), a Delaware Brokerage Corporation, informed New York that it would no longer include the Escheatable Property of Unknowns in the property paid over to New York, and informed New York that if the Escheatable Property of Unknowns was escheatable, it was escheatable only to Delaware, as the state of its incorporation, pursuant to Delaware's Escheat Law. Shortly thereafter, New York commenced an administrative proceeding, seeking the recovery of the Escheatable Property of Unknowns. That administrative proceeding still pends.

19. Another Delaware Brokerage Corporation, Smith Barney, Harris Upham & Co. Incorporated ("Smith

Barney"), has also recently determined not to escheat to New York any Escheatable Property of Unknowns on the ground that such property could properly be escheated only by Delaware under the Delaware Escheat Law. Smith Barney communicated that decision to the New York abandoned property authorities. In response, New York has made a demand upon Smith Barney to report and to pay such property to it and has stated that, absent compliance with such demand, New York intends to commence an administrative proceeding against Smith Barney to recover such property.

20. Another Delaware Brokerage Corporation, Kidder, Peabody & Co. Incorporated ("Kidder Peabody"), declined in 1987 to escheat to New York Escheatable Property of Unknowns for the year 1983, on the ground that such property can properly be escheated only by Delaware under the Delaware Escheat Law. New York has informed Kidder Peabody that it will make a demand for payment of such property to it and that, absent compliance with such demand, New York intends to commence an administrative proceeding against Kidder Peabody to recover such property.

VI.

21. The amount of Escheatable Property of Unknowns wrongfully demanded by New York from the Delaware Brokerage Corporations has been substantial. For example, in the years 1981 to 1984 alone, Dean Witter Reynolds Inc. ("Dean Witter"), one of the Delaware Brokerage Corporations, reported and paid over to New York the following Escheatable Property of Unknowns:

Year	*Amount*
1981	$ 284,005
1982	274,089
1983	967,925
1984	995,532
	$2,521,551

Plaintiff is informed that the amounts of Escheatable Property of Unknowns paid over by Dean Witter to New York in those years were not atypical. For example, Smith Barney paid New York more than one million dollars in Escheatable Property of Unknowns in each of the years 1985 and 1986. Merrill Lynch, Pierce, Fenner & Smith Incorporated, another Delaware Brokerage Corporation, paid New York more than two million dollars in Escheatable Property of Unknowns in 1982. Accordingly, plaintiff believes that, since July 13, 1971, New York has taken many millions of dollars in Escheatable Property of Unknowns which rightfully belongs to Delaware. The resolution of New York's competing claim thus is of substantial monetary importance to Delaware.

VII.

22. By reason of New York's past and continuing claims to the Escheatable Property of Unknowns, there is a controversy between Delaware and New York as to which of the two states may properly escheat such property.

23. The previous taking by New York of Escheatable Property of Unknowns from the Delaware Brokerage Corporations, and its continuing demand to take such property in the future, are contrary to this Court's de-

cisions in *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* that abandoned property attributable to a beneficial owner for whom the holder has no name or address record is escheatable only pursuant to the laws of the holder's state of incorporation.

24. Under the rule of *Texas v. New Jersey* and *Pennsylvania v. New York,* Delaware is entitled, as the state of incorporation of the Delaware Brokerage Corporations, to recover from New York all such property which has heretofore been paid over or transferred to New York by them.

25. Delaware cannot be protected from irreparable injury and loss of property unless this Court grants the relief sought by this Complaint.

26. Delaware has no adequate remedy at law.

WHEREFORE, the plaintiff prays:

1. That this Court take jurisdiction of the parties and subject matter herein;

2. That this Court hear and determine the controversy herein in such manner as the Court deems appropriate;

3. That a temporary injunction be issued restraining the defendant, New York, from proceeding with any action now pending, or from instituting any action hereafter, to escheat and/or take custody of any portion of the Escheatable Property of Unknowns held by the Delaware Brokerage Corporations;

4. That judgment be entered that the Escheatable Property of Unknowns, held by the Delaware Brokerage Corporations, is subject only to the escheat of Delaware, under the Delaware Escheat Law;

5. That the defendant, New York, be directed to pay or deliver to plaintiff, Delaware, all the Escheatable Property of Unknowns paid or delivered to New York by the Delaware Brokerage Corporations, which has been abandoned for a period of seven years or more and which hereafter becomes abandoned under the Delaware Escheat Law; and

6. That the plaintiff, Delaware, have such other and further relief as this Court may deem just.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, COUNSEL OF RECORD
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

February 9, 1988

No. ———— Original

———o———

In The

Supreme Court of the United States

October Term, 1987

———o———

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

———o———

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT

———o———

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, COUNSEL OF RECORD
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Plaintiff
The State of Delaware

QUESTIONS PRESENTED

I. Does the Complaint present a justiciable controversy between States calling for the exercise of the Court's original and exclusive jurisdiction?

II. Should this Court take jurisdiction of this case in order to prevent New York from unjustly depriving Delaware of its entitlement, under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), to escheat monies and other intangible property held by securities brokers incorporated under the laws of Delaware for beneficial owners who cannot be identified?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	14
TABLE OF AUTHORITIES	16
JURISDICTION	17
STATEMENT OF THE CASE	17
SUMMARY OF ARGUMENT	22
ARGUMENT	23
I. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WARRANTING THE EXERCISE OF THIS COURT'S ORIGINAL AND EXCLUSIVE JURISDICTION.	23
II. THIS COURT SHOULD TAKE JURISDICTION OF THIS DISPUTE IN ORDER TO PREVENT NEW YORK FROM DEPRIVING DELAWARE OF ITS RIGHTS AS ESTABLISHED BY THIS COURT IN *TEXAS v. NEW JERSEY* AND *PENNSYLVANIA v. NEW YORK*.	25
CONCLUSION	28

TABLE OF AUTHORITIES

Page

CASES:

Pennsylvania v. New York, 407 U.S. 206 (1972) ..... *passim*

Texas v. New Jersey, 379 U.S. 674 (1965) ..... *passim*

Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 23, 24

CONSTITUTION:

Constitution of the United States Article III, Section 2 ..... 17, 22, 24

STATUTES:

United States Code, Title 28, § 1251(a) 17, 22, 24

Del. Code Ann. tit. 12, §§ 1197-1211 (1987) 19

New York Abandoned Property Law §§ 510-514 (McKinney Supp. 1988) 19

JURISDICTION

The original jurisdiction of the Court is invoked under Article III, Section 2 of the Constitution of the United States, and under United States Code, Title 28, Section 1251(a).

—o—

STATEMENT OF THE CASE

The State of Delaware ("Delaware") seeks recovery of certain monies and other intangible property wrongfully escheated by the State of New York ("New York"), along with a prospective declaration establishing Delaware's exclusive right to escheat similar property. Delaware bases its claim on this Court's decisions in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972).

The Complaint, which Delaware seeks leave to file, recites the following facts:

The intangible personal property at issue was or is held by certain corporations incorporated under the laws of Delaware engaged in the securities brokerage business ("Delaware Brokerage Corporations"). Each of the Delaware Brokerage Corporations has offices and conducts business in New York, as well as in other states of the United States.[1] The Delaware Brokerage Corporations had or have such property as the result of distributions made with respect to securities held or formerly held for the account of customers but as to which the brokers have no identification or last known address of anyone

---

[1] Certain of the Delaware Brokerage Corporations are listed in paragraph 7 of the Complaint.

claiming to be the beneficial owners (the "Escheatable Property of Unknowns").

The Delaware Brokerage Corporations, in the course of their business, act as record owners of securities, primarily stocks and bonds, the beneficial ownership of which is for the account of customers of the Delaware Brokerage Corporations. As record owners, the Delaware Brokerage Corporations from time to time receive distributions with respect to the securities, including dividends and interest (the "Payments"). As the Payments are received, the Delaware Brokerage Corporations allocate to the accounts of their customers the Payments to which they are beneficially entitled.

In certain instances, however, the Delaware Brokerage Corporations are unable to identify the beneficial owners of the Payments. For example, a Delaware Brokerage Corporation may sell in the open market a customer's securities and the ultimate acquiror in the market of those securities thereafter may fail to remove the Delaware Brokerage Corporation as the record owner of such securities before the record date on which a Payment becomes payable to that Delaware Brokerage Corporation. Unless a claim to pay over such Payment is made by the ultimate acquiror of such securities, that Delaware Brokerage Corporation will not know who the beneficial owner of such Payment is or what the address is for such beneficial owner. Accordingly, where no claim to pay over the Payments is made, the Delaware Brokerage Corporation has Escheatable Property of Unknowns.

Since at least 1971, both Delaware and New York have claimed the right, under their respective laws, to escheat

the Escheatable Property of Unknowns held by the Delaware Brokerage Corporations. *See generally* Del. Code Ann. tit. 12, §§ 1197-1211 (1987) ("Delaware Escheat Law"), and New York Abandoned Property Law §§ 510-514 (McKinney Supp. 1988) ("New York Escheat Law"), attached hereto as Exhibits "A" and "B", respectively. Unlike the Delaware Escheat Law, which requires property to be abandoned for seven years before its escheat, New York law provides for escheat after three years. Delaware Escheat Law § 1198(8); New York Escheat Law § 511.[2]

From at least 1971, New York has demanded from the Delaware Brokerage Corporations all of the Escheatable Property of Unknowns at issue here, after the running of the three or five year dormancy period provided for under the New York Escheat Law. Moreover, New York has published and disseminated to securities brokers and dealers, including the Delaware Brokerage Corporations, a publication entitled "Abandoned Property Law Handbook for Brokers and Dealers" ("Handbook"), which makes clear New York's position that it is entitled to escheat the Escheatable Property of Unknowns. *See generally* relevant excerpts of the Handbook attached hereto as Exhibit "C".

---

[2] Section 511 of the New York Escheat Law was amended in 1973 to shorten the required dormancy period prior to escheat from five to three years, effective December 31, 1975. 1973 N.Y. Laws c.617 § 6. New York's shorter waiting period does not give it the right to Escheatable Property of Unknowns because, under *Texas v. New Jersey* and *Pennsylvania v. New York*, the state of the holder's incorporation—here Delaware—has the superior right to escheat.

Most of the Delaware Brokerage Corporations have acceded to New York's demands to pay over the Escheatable Property of Unknowns and, accordingly, Delaware, after the running of its seven year dormancy period, has been refused payment of the Escheatable Property of Unknowns on the basis that such property has already been paid over to New York, and in reliance on a representation contained in the General Provisions of the New York Escheat Law that New York will hold harmless any entity in respect of competing claims made on property taken by New York. New York Escheat Law § 1404 (attached hereto as part of Exhibit "B"). Plaintiff is aware of only three of the Delaware Brokerage Corporations which to date have challenged New York's claim to the Escheatable Property of Unknowns.

In the early 1980's, PaineWebber Incorporated ("PaineWebber"), a Delaware Brokerage Corporation, informed New York that it would no longer include the Escheatable Property of Unknowns in the property paid over to New York, and that if such property was escheatable, only Delaware, the state of its incorporation, had a claim to it.[3] Shortly thereafter, New York commenced an administrative proceeding, seeking the recovery of the Escheatable Property of Unknowns. That administrative proceeding still pends.

Another Delaware Brokerage Corporation, Smith Barney, Harris Upham & Co. Incorporated ("Smith Bar-

---

[3] We understand that PaineWebber may contend that the Escheatable Property of Unknowns is not abandoned property and thus not escheatable at all. Delaware does not herein seek any determination of that issue.

ney"), has also recently determined not to escheat to New York any Escheatable Property of Unknowns on the ground that such property can properly be escheated only by Delaware under the Delaware Escheat Law. Smith Barney communicated that decision to the New York abandoned property authorities. In response, New York has made a demand upon Smith Barney to report and to pay such property to it, and has stated that, absent compliance with such demand, New York intends to commence an administrative proceeding against Smith Barney to recover such property.

Another Delaware Brokerage Corporation, Kidder, Peabody & Co. Incorporated ("Kidder Peabody"), declined in 1987 to escheat to New York Escheatable Property of Unknowns for the year 1983, on the ground that such property can properly be escheated only by Delaware under the Delaware Escheat Law. New York has informed Kidder Peabody that it will make a demand for payment of such property to it and that, absent compliance with such demand, New York intends to commence an administrative proceeding against Kidder Peabody to recover such property.

The amount of Escheatable Property of Unknowns wrongfully demanded by New York from the Delaware Brokerage Corporations has been substantial. For example, in the years 1981 to 1984, Dean Witter Reynolds Inc. ("Dean Witter"), one of the Delaware Brokerage Corporations, itself reported and paid over to New York the following Escheatable Property of Unknowns:

Year	Amount
1981	$ 284,005
1982	274,089
1983	967,925
1984	995,532
	$2,521,551

Plaintiff is informed that the amounts of Escheatable Property of Unknowns paid over by Dean Witter to New York in those years were not atypical and, accordingly, plaintiff believes that since July 13, 1971 New York has taken many millions of dollars in Escheatable Property of Unknowns which rightfully belong to Delaware.[4] The resolution of New York's competing claim is of substantial monetary importance to Delaware.

—o—

SUMMARY OF ARGUMENT

I. Both New York and Delaware claim the right to escheat the same intangible property held or formerly held by Delaware Brokerage Corporations for which the beneficial owners cannot be identified. The resolution of these conflicting claims between two States is a justiciable controversy within the original and exclusive jurisdiction of this Court under Article III, Section 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code.

---

[4] For example, Smith Barney paid New York more than one million dollars in Escheatable Property of Unknowns in each of the years 1985 and 1986. Merrill Lynch, Pierce, Fenner & Smith Incorporated, another Delaware Brokerage Corporation, paid New York more than two million dollars in Escheatable Property of Unknowns in 1982.

II. In *Texas v. New Jersey*, the Court established rules for the determination of the priority of the right of escheat between States claiming the same abandoned intangible property. Those rules were established because they provided an efficient, easily administered, and fair method of determining potentially conflicting escheat claims. One such rule there established was that where the holder of the abandoned property had no address record for the beneficial owner, the state of the holder's incorporation had the right to escheat the property. At the urging of New York, that rule was reaffirmed in *Pennsylvania v. New York* in circumstances where the rule entitled the state of incorporation to significant amounts of intangible property. Under that efficacious rule, Delaware, not New York, is entitled to escheat the intangible personal property at issue here.

———o———

ARGUMENT

I. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WARRANTING THE EXERCISE OF THIS COURT'S ORIGINAL AND EXCLUSIVE JURISDICTION.

The Complaint alleges that Delaware has the right, under the Delaware Escheat Law, to escheat the Escheatable Property of Unknowns held or formerly held by Delaware Brokerage Corporations. New York not only claims the right to the same property under its Escheat Law, but in fact has escheated many millions of dollars of Escheatable Property of Unknowns formerly held by Delaware Brokerage Corporations. The Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating the same property. *Western Union Telegraph*

Co. v. Pennsylvania, 368 U.S. 71 (1961). There is, therefore, a justiciable controversy between Delaware and New York within the meaning of Article III, Section 2, of the Constitution of the United States and Title 28, Section 1251(a) of the United States Code.

In *Western Union Telegraph Co. v. Pennsylvania, supra,* this Court reversed a judgment of escheat obtained by Pennsylvania in its own courts, because New York made a claim to the same intangible property. This Court declared that it would be the appropriate forum for such a controversy:

> Our Constitution has wisely provided a way in which controversies between states can be settled without subjecting individuals and companies affected by those controversies to a deprivation of their right to due process of law. . . .
>
> . . . .
>
> The rival state claimants here, as in Texas v. Florida, [306 U.S. 398 (1939)], can invoke our original jurisdiction.

Id. at 77. This Court went on to hold:

> The rapidly multiplying state escheat laws, originally applying only to land and other tangible things but recently moving into the elusive and wide-ranging field of intangible transactions have presented problems of great importance to the states and persons whose rights will be adversely affected by escheats. This makes it imperative that controversies between different states over their right to escheat intangibles be settled in a forum where all the states that want to do so can present their claims for consideration and final, authoritative determination. Our Court has jurisdiction to do that.

Id. at 79 (footnote omitted).

Thereafter, in *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* this Court's original jurisdiction was invoked to resolve disputes between states concerning conflicting claims to escheat intangible property. This case involves the same kind of controversy, and this Court has original and exclusive jurisdiction over it.

II. THIS COURT SHOULD TAKE JURISDICTION OF THIS DISPUTE IN ORDER TO PREVENT NEW YORK FROM DEPRIVING DELAWARE OF ITS RIGHTS AS ESTABLISHED BY THIS COURT IN TEXAS V. NEW JERSEY AND PENNSYLVANIA V. NEW YORK.

This Court should take jurisdiction of this dispute because New York, to Delaware's detriment, is failing to follow the clear precedent of *Texas v. New Jersey,* 379 U.S. 674 (1965), and *Pennsylvania v. New York,* 407 U.S. 206 (1972), which resolved the rights of the various states to escheat intangible property under the circumstances present here.

In *Texas v. New Jersey,* four states claimed the right to escheat intangible obligations owed by Sun Oil Company to 1,730 creditors, including amounts for which the holder's records did not reveal an address for the owner of the funds at issue. *Id.* at 675, n.4. This Court, seeking "a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence" (*id.* at 678), held that, where ascertainable, the state of the last known address of the owner had the right to escheat. Where no such address was available, however, or where the state of the last known address had no applicable escheat law, this Court held that the state of the holder's incorporation had the right to escheat

the property (subject to any subsequent, superior claim by the state of the last known address). *Id.* at 682. The rule adopted was found to be "the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Id.* at 683.

In *Pennsylvania v. New York*, New York successfully urged this Court to reaffirm the rule of *Texas v. New Jersey*, in a dispute concerning competing escheat claims with respect to money orders and drafts which had been neither paid nor refunded. New York sought to escheat such funds as the state of incorporation of Western Union when the company had no address for the owners of the funds. Pennsylvania sought to distinguish *Texas v. New Jersey* because of the high percentage of owners who were unknown or for whom no address was available. New York, however, took the position that the rule of *Texas v. New Jersey* should apply to "all types of abandoned intangible obligations" without "exceptions." Specifically, New York contended that the rule applied to such things as shareholder dividends where there was no known address for the owner (N.Y. Br. 4, 10-11, 15—footnote omitted):

New York's Position

> The rule announced in *Texas v. New Jersey*, 379 U.S. 674 (1965) was intended to apply to all types of abandoned intangible obligations. The very essence of the holding was that each abandoned property case should not have to be decided on the basis of its particular facts. Each case should not require the Court to, "devise new rules of law to apply to ever-developing new categories of facts," 379 U.S. at 679. . . .
>
> . . . .
>
> What is clear is that the Court was fully aware that with respect to portions of four of the eight categories of "debts" involved in *Texas* there were

> creditors "some of whom had no last known address indicated", 379 U.S. at 675-76, fn. 4. With this fact in mind, the Court laid down a rule applicable to "all" abandoned intangible obligations, making specific provision for those obligations where the creditor's last address was unknown . . . .
>
> In this regard, it should be noted that *Texas v. New Jersey* involved a wide variety of intangibles such as . . . shareholder dividends . . . .
>
> . . . .
>
> In summary, the eroding exceptions proposed to the rule adopted by this Court "with a unique tone of finality" in *Texas v. New Jersey*, should be rejected.

This Court agreed with New York's position, holding that:

> [T]o vary the application of the Texas rule according to the adequacy of the debtor's records [i.e., the percentage of unknown addresses] would require this Court to do precisely what we said should be avoided —that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

407 U.S. at 215, citing *Texas, supra*, 379 U.S. at 679.

Notwithstanding its position as the proponent of the rule in *Pennsylvania v. New York*, New York is frustrating the application of this "fair[ ], . . . easy to apply, and . . . most generally acceptable" rule by claiming that it is entitled to escheat the Escheatable Property of Unknowns held by Delaware Brokerage Corporations. This Court should take jurisdiction over this important controversy and permit Delaware to file its Complaint so that New York cannot selectively embrace the rulings of this Court in accordance with its interest of the moment, to the substantial damage of a sister state.

———o———

CONCLUSION

This Court has original and exclusive jurisdiction of this dispute between Delaware and New York. The Motion For Leave To File Complaint should be granted. The dispute should be resolved according to this Court's precedents which establish that Delaware is entitled to escheat the property at issue. Further, New York should be directed to pay to Delaware amounts already paid to it to which Delaware is or will be entitled under the Delaware Escheat Law, and to cease interfering with Delaware's right to escheat the Escheatable Property of Unknowns held by the Delaware Brokerage Corporations.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, Counsel of Record
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Plaintiff
The State of Delaware

EXHIBIT A

DELAWARE ESCHEAT LAW

Subchapter IV. Other Unclaimed Property

§ 1197. Other property escheated.

Except as otherwise provided elsewhere in the Delaware Code all property, as hereinafter defined and not otherwise subject to escheat in accordance with this chapter, the title to which has failed and the power of alienation suspended by reason of: (1) The death of the owner thereof, intestate, leaving no known heirs-at-law; (2) the owner thereof having disappeared or being missing from his last known place of residence for a continuous period of 7 years or more, leaving no known heirs-at-law; or (3) the same having been abandoned by the owner thereof, as hereinafter defined, shall descend to the State as an escheat in accordance with the Constitution, the general laws of this State or this subchapter. (12 Del. C. 1953, § 1197; 58 Del. Laws, c. 275, § 1; 63 Del. Laws, c. 299, § 1)

§ 1198. Definitions.

For purposes of this subchapter, the following definitions shall apply:

(1) "Abandoned property" means property against which a full period of dormancy has run.

(2) "Appropriation" means the act of the State, through its duly constituted officers or agencies, in taking or accepting possession or custody of abandoned, unprotected, unclaimed or lost property as conservator thereof for later disposition by descent to the State as an escheat or redemption by the owner as provided in this subchapter.

(3) "Escheat" means the descent or devolution of property to the State under and by virtue of the Constitution of the State, the general laws of this State or this subchapter.

(4) "Escheatable property" means property which is subject to escheat to the State under and by virtue of the Constitution of the State, the general laws of this State or this subchapter.

(5) "Escheated property" means property which has descended to the State as an escheat.

(6) "Holder" means any person having possession, custody or control of the property of another person and includes a credit union, a post office, a depository, a bailee, a trustee, a receiver or other liquidating officer, a fiduciary, a governmental department, institution or agency, a municipal corporation and the fiscal officers thereof, a public utility, service corporation and every other legal entity incorporated or created under the laws of this State or doing business in this State. For purposes of this subchapter, the issuer of any intangible ownership interest in a corporation, whether or not represented by a stock certificate, which is registered on stock transfer or other like books of the issuer or its agent, shall be deemed a holder of such property. This definition shall be construed as distinguishing the term "holder" of property from the term "owner" of property as hereinbefore defined and as excluding from the term "holder" any person holding or possessing property by virtue of title or ownership.

(7) "Owner," in addition to its commonly accepted meaning, shall be construed to particularly mean and include any person, as hereinbefore defined, having the legal or equitable title to property coming within the purview of this subchapter.

(8) "Period of dormancy" means the full and continuous period of 7 years, except a period of 15 years for traveler's checks, during which an owner has ceased, failed or neglected to exercise dominion or control over his property or to assert a right of ownership or possession or to make presentment and demand for payment and satisfaction or to do any other act in

relation to or concerning such property, providing that with respect to an intangible ownership interest in a corporation, whether or not represented by a stock certificate, the period of dormancy means a period of 7 years during which: (1) The owner has not claimed a dividend, distribution or other sum with respect to such interest; (2) the owner has not communicated in writing with the holder concerning such property or otherwise communicated with the holder concerning such property which communication is evidenced by a writing or other record prepared by the holder or its employee in the ordinary course of business; and (3) at the end of which the holder does not know the current location of the owner of such property. A full period of dormancy shall be deemed to have run with respect to any dividends or other distributions held for or owing to an owner at the time a period of dormancy shall have run with respect to the intangible ownership interest in a corporation to which such dividend or other distribution attaches. The term does not apply to a period of time during which the owner has failed or neglected to make a demand or file a claim within the time prescribed in an order or decree of court or in a legal notice served and published pursuant to law or an order of court and the period of dormancy shall not commence to run with respect to claims, demands or other property held by a holder pursuant to a written agreement which contemplates that there shall be a period of inactivity, until the expiration of the contemplated period of inactivity. This definition shall be construed as excluding any act or doing of a holder of abandoned property not done at the express request or authorization of the owner.

(9) "Person" includes a natural person, a corporation organized or created under the laws of this State or a corporation doing business or which has been engaged in business in this State, a copartnership, a voluntary association and every or any other association or organization of individuals, but excludes banking organizations and any life insurance company.

(10) "Property" means personal property, of every kind or description, tangible or intangible, in the possession or under the control of a holder, as hereinafter defined, and includes, but not by way of limitation, (i) money; (ii) bills of exchange; (iii) intangible ownership interests in corporations, whether or not represented by a stock certificate, bonds and other securities; (iv) credits, including wages and other allowances for services earned or accrued on or after January 1, 1958, money orders and traveler's checks, also proceeds held for unredeemed gift certificates; (v) dividends, cash or stock; (vi) certificates of membership in a corporation or association; (vii) security deposits; (viii) funds deposited by holder with fiscal agents of fiduciaries for payment to owner of dividends, coupon interest and liquidation value of stocks and bonds; (ix) funds to redeem stocks and bonds; (x) amounts refundable from excess or increased rates or charges heretofore or hereafter collected by a corporation for utility services lawfully furnished by it which have been or shall hereafter lawfully be ordered refunded to consumers or other persons entitled thereto and any interest due thereon and which have remained unclaimed by the persons entitled thereto for 7 years from the date they became payable in accordance with the final determination or order providing for the refunds; (xi) amounts refundable from customer deposits heretofore or hereafter collected by a public utility and any interest due thereon, and which have remained unclaimed by the persons entitled thereto for 7 years from the date they become payable; and (xii) all other liquidated choses in action of whatsoever kind or character. The word "property" does not include credits or deposits evidenced by cash balances on unclaimed or refused personal property nor any property, except the items specified in this subdivision, the right to recover which in a proceeding brought by the owner would be barred by any statute of limitations, state or federal. (12 Del. C. 1953, § 1198; 58 Del. Laws, c. 275, § 1; 58 Del. Laws, c. 426, §§ 1-3; 59 Del.

Laws, c. 320, §§ 1, 2; 63 Del. Laws, c. 311, § 4; 65 Del. Laws, c. 351, §§ 1-3.)

§ 1199. Report by holders of abandoned property.

(a) Every holder of funds or other property, tangible or intangible, deemed abandoned under this subchapter shall file with the State Escheator, on or before June 30 of each year, as of December 31 next preceding, a report, in duplicate, with respect to such property. The report shall be verified and shall include:

(1) The name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property deemed abandoned under this subchapter;

(2) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $50 each may be reported in aggregate;

(3) The date when the property became payable, demandable or returnable and the date of the last transaction with the owner with respect to the property; and

(4) Other information which the State Escheator may prescribe.

(b) Upon written request the State Escheator may grant an extension of time with respect to the date for filing the report.

(c) The requirements of this section for filing an annual report shall not apply to municipal corporations or counties and the fiscal officers thereof.

(d) Verification, if made by a partnership, shall be executed by a partner, if made by an unincorporated asso-

ciation or private corporation, by an officer and if made by a public corporation, by its chief fiscal officer.

(e) If the person holding property deemed abandoned is a successor to other persons who previously held the property for the owner or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(f)(1) With respect to any stock or other certificate of ownership or any dividend, profit, distribution, interest, payment on principal or other sum held owing by a corporation or other business association for or to a shareholder, certificate holder, member, bondholder or other security holder, the initial report filed under this section shall include all such items of property deemed abandoned under this subchapter without limitation as to time.

(2) Except as provided in paragraph (1) of this subsection, the initial report shall include all such items of property which, under this subchapter, would have been deemed abandoned on the effective date of this subchapter had this subchapter been in effect on January 1, 1964 (12 Del. C. 1953, § 1199; 58 Del. Laws, c. 275, § 1; 58 Del. Laws, c. 426, § 4.)

§ 1200. Notice and publication of lists of abandoned property.

(a) Within 30 days after receiving the report of abandoned property required by § 1199 of this title, the State Escheator shall cause to be published a notice entitled: "NOTICE OF NAMES OF PERSONS APPEARING TO BE OWNERS OF ABANDONED PROPERTY."

(b) Such notice shall be published at least once each week for 2 successive weeks in a newspaper in the county

in this State in which is located the last known address of any person to be named in the notice. If no address is listed or if the address is outside this State, the notice shall be published in the county in which the holder has his principal place of business. If the holder has no principal place of business in this State, then notice shall be published in the County of New Castle.

(c) The published notice shall contain the names in alphabetical order and last known addresses, if any, of persons listed in the report, a brief description of the property and a statement that if proof of claim is not presented by the owner to the holder within 60 days from date of publication the abandoned property shall be paid to or placed in the custody of the State Escheator, to whom all further claims must thereafter be directed.

(d) The State Escheator shall not be required to publish in such notice items of value under $50 each. (12 Del. C. 1953, § 1200; 58 Del. Laws, c. 275, § 1; 58 Del. Laws, c. 426, § 5.)

§ 1201. Payment or delivery of abandoned property.

Ninety days after filing the report required by § 1199 of this title, every holder of abandoned property shall pay or deliver to the State Escheator all abandoned property specified in the report, except that if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the 90-day period specified in § 1200 of this title, or if it appears that for some other reason the reported abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be deemed abandoned, to the State Escheator, but in lieu

thereof shall file a verified written explanation of the proof of claim or other reason. The holder of any intangible ownership interest in a corporation deemed abandoned under this subchapter shall, when making the delivery contemplated by this section:

(1) If such interest is a certificated security as defined in § 8-102(1) of Title 6 deliver either the original stock certificate evidencing the abandoned property, if such is in its possession or a duly issued replacement certificate evidencing such property in a form suitable for transfer; or

(2) If such interest is an uncertificated security as defined in § 8-201(1) of Title 6 cause such uncertificated security to be registered in the name of the State Escheator. (12 Del. C. 1953, § 1201; 58 Del. Laws, c. 275, § 1; 58 Del. Laws, c. 426, § 6; 65 Del. Laws, c. 351, § 4.)

§ 1202. Periods of limitation not a bar.

The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of propery, shall not prevent the money or property from being deemed abandoned property nor affect any duty to file a report required by this subchapter or to pay or deliver abandoned property to the State Escheator. (12 Del. C. 1953, § 1202; 58 Del. Laws, c. 275, § 1; 58 Del. Laws, c. 426, § 7.)

§ 1203. Effect of payment and delivery.

(a) The payment or delivery of property to the State Escheator by any holder shall terminate any legal relationship between the holder and the owner and shall release and discharge such holder from any and all liability to the

owner, his heirs, personal representatives, successors and assigns by reason of such delivery or payment, regardless of whether such property is in fact and in law abandoned property and such delivery and payment may be pleaded as a bar to recovery and shall be a conclusive defense in any suit or action brought by such owner, his heirs, personal representatives, successors and assigns or any claimant against the holder by reason of such delivery or payment.

(b) Upon the delivery in good faith of a duplicate certificated security to the State Escheator or the registration of an uncertificated security to the State Escheator pursuant to § 1201 of this title, the holder and any transfer agent, registrar or other person acting for or on behalf of the holder in executing or delivering such duplicate certificate or effectuating such registration, is relieved of all liability of every kind to every person, including any person acquiring the original of a certificated security or the duplicate of a certificated security issued to the State Escheator, for any losses or damages resulting to any person by issuance and delivery to the State Escheator of the duplicate certificated security or the registration to his name of an uncertificated security.

(c) If the holder pays or delivers property to the State Escheator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the State Escheator acting on behalf of the State, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim.

(d) For the purposes of this section, "good faith" means that:

(1) Payment or delivery was made in a reasonable attempt to comply with this subchapter;

(2) The person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to him, that the property was abandoned for the purposes of this subchapter; and

(3) There is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry. (12 Del. C. 1953, § 1203; 58 Del. Laws, c. 426, § 8; 65 Del. Laws, c. 351, § 5.)

§ 1204. Sale of abandoned property.

(a) All abandoned property, other than money, delivered to the State Escheator under this subchapter shall be sold or disposed of in accordance with § 1143 of this title.

(b) All sales of property made by the State Escheator under this subchapter shall pass absolute title to the purchaser. The State Escheator or the Secretary of State shall execute all documents necessary to complete the transfer of title. (12 Del. C. 1953, § 1204; 58 Del. Laws, c. 426, § 9.)

§ 1205. Deposit and disbursement of funds.

(a) All funds received by the State Escheator under this subchapter, including the proceeds of sale under § 1204 of this title shall forthwith be paid and deposited into the General Fund of the State.

(b) All disbursements for expenses, claims, storage, etc., made or authorized by the State Escheator in connec-

tion with the administration of this subchapter shall be paid by the Secretary of Finance upon presentation of a signed voucher by the State Escheator. (12 Del. C. 1953, § 1205; 58 Del. Laws, c. 426, § 10.)

§ 1206. Claims for abandoned property paid or delivered; determination of claims; appeals.

(a) Any person claiming an interest in any property paid or delivered to the State Escheator under this subchapter may file a claim thereto or to the proceeds from the sale thereof with the State Escheator.

(b) The determination of claims and rights of appeal shall be accomplished as prescribed in § 1146(b) of this title.

(c) When property is paid or delivered to the State Escheator under this subchapter, the owner is not entitled to receive income or other increments accruing thereafter. (12 Del. C. 1953, § 1206; 58 Del. Laws, c. 426, § 11.)

§ 1207. Penalties; proceeding to compel delivery.

(a) Any person failing to report or pay over any amounts or property as required by this subchapter shall be subject to a civil penalty of $25 for each day such report or payment is withheld, not to exceed a maximum of $2,500, except that the State Escheator may extend the time for filing the report or making payment and may waive all or any portion of the penalty if the failure is due to reasonable cause. Provided, however, in no case shall the penalty imposed exceed 100% of the amount required by this subchapter to be reported or paid to the State Escheator.

(b) If any person refuses to pay or deliver property to the State Escheator as required by this subchapter, the

Escheator may bring an action in the Court of Chancery of the county where the holder resides or has his principal place of business to enforce such payment or delivery. (12 Del. C. 1953, § 1207; 58 Del. Laws, c. 426, § 12; 63 Del. Laws, c. 311, § 3.)

§ 1208. Rules and regulations.

The State Escheator may make such rules and regulations as he may deem necessary to administer and enforce this subchapter. (12 Del. C. 1953, § 1208; 58 Del. Laws, c. 426, § 13.)

§ 1209. Examination of records.

Whenever the State Escheator has reason to believe that a person has failed to report property which should have been reported pursuant to this subchapter, the State Escheator may petition the Court of Chancery for an order requiring such person to produce for examination, at a reasonable time and place, such of his books, records or papers as are reasonably necessary for the State Escheator to determine whether a report was required. (12 Del. C. 1953, § 1209; 58 Del. Laws, c. 426, § 14.)

§ 1210. Effect of laws of other states.

This subchapter shall not apply to any property that has been presumed abandoned or escheated under the laws of another state prior to July 13, 1971. (12 Del. C. 1953, § 1210; 58 Del. Laws, c. 426, § 15.)

§ 1211. Property presumed abandoned or escheated under the laws of another state.

Notwithstanding any other provisions of this subchapter, if specific property which is subject to this subchapter

is held for or owed or distribuable to an owner whose last known address is in another state, such specific property is not presumed abandoned in this State and is not subject to this subchapter if such property may be claimed as abandoned or escheated under the laws of such other state. (12 Del. C. 1953, § 1211; 58 Del. Laws, c. 426, § 16.)

EXHIBIT B

NEW YORK ESCHEAT LAW

Article V-A—Unclaimed Property Held by Brokers

§ 510. **Definitions**

When used in this article, the following items shall have the following meanings:

1. "Corporation" shall include any joint stock company, corporation, association of two or more individuals, committee, public authority, or business trust.

2. "Public issuer" shall include the United States, the several states and territories thereof, political subdivisions and municipal corporations within such states and territories, foreign countries and political subdivisions and municipal corporations within such foreign countries.

3. "Security" shall include:

(a) Any instrument issued by a corporation or public issuer to evidence an obligation to make any payment of the principal amount of a debt or of any increment due or to become due thereon, or

(b) Any instrument issued by a corporation to evidence a proprietary interest therein except:

(i) A policy of insurance issued by a mutual insurance corporation, or

(ii) A share issued by a savings and loan association, a building and loan association, or a credit union.

4. "Broker" shall include any individual or corporation engaging in this state in the purchase, sale or exchange of securities for or on behalf of any customer but shall

not include a banking organization as defined in section one hundred three of this chapter.

5. "Dealer" shall include any individual or corporation engaging in this state as a regular business in the purchase, sale or exchange of securities for his or its own account, through a broker or otherwise, but shall not include a banking organization as defined in section one hundred three of this chapter.

6. (a) "Customer" shall include any individual or corporation entering into a contract in this state with a broker or dealer by which such broker or dealer agrees to effect the purchase, sale, or exchange, or to keep custody of any security for on on behalf of such individual or corporation. The term "customer" shall also include any individual or corporation entering into a contract in this state with a broker or dealer whereby such broker or dealer for his own account buys from or sells to such individual or corporation, any security.

(b) If on the books of account located at an office in this state of a broker or dealer there is indicated a balance to the credit of an individual or corporation it shall be presumed unless established to the contrary that such balance arose from a contract as described in the preceding paragraph.

7. "Amount" shall include any dividend, profit or other distribution, paid in stock or cash, and any interest or other payment on principal.

8. "Wages" shall include moneys payable, under contract or otherwise, for services rendered to a broker or dealer, less lawful deductions.

(Added L.1952, c. 461, § 1; amended L.1965, c. 539, § 4; L.1972, c. 23, § 1; L.1980, c. 46, § 4.)

§ 511. Unclaimed property; when deemed abandoned

The following unclaimed property shall be deemed abandoned property:

1. Any amount (a) received in this state after June thirtieth, nineteen hundred forty-six by a broker or dealer or nominee of such broker or dealer as the holder of record of a security remaining unpaid to the person entitled thereto for three years following the receipt thereof, or (b) when paid to such broker, dealer or nominee on or with respect to a security which has been deemed abandoned.

1-a. Any amount (a) received in this state on or after July first, nineteen hundred seventy-four by a broker or dealer or nominee of such broker or dealer other than as the holder of record of a security remaining unpaid to the person entitled thereto for three years following the receipt thereof, or (b) when paid to such broker, dealer or nominee on or with respect to a security which has been deemed abandoned.

2. Any amount (a) received in this state after June thirtieth, nineteen hundred forty-six due from a broker or dealer or nominee of such broker or dealer to a customer which has remained unpaid to the customer for three years after the date of the last entry, other than the receipt of dividends or interest in the account of such broker, dealer or nominee with such customer, or (b) payable on or with respect to a security which has been deemed abandoned.

3. Any security held in this state by a broker or dealer, or nominee of such broker or dealer, as the holder of record of a security for a customer or for a person or persons unknown to such broker or dealer or nominee

where, for three successive years, all amounts paid thereon or with respect thereto and received after June thirtieth, nineteen hundred forty-six by such broker or dealer or nominee have remained unclaimed.

Provided, however, that if any amount or security specified in subdivision one, two or three of this section is reflected, recorded or included in an account with respect to which such broker or dealer has on file evidence in writing received within the three years immediately preceding the thirty-first day of December preceding the date such amount or security would otherwise be payable or deliverable pursuant to section five hundred twelve that the person entitled thereto had knowledge of such account, then such amount or security shall not be deemed abandoned property.

4. Any security held by a broker or dealer or nominee of such broker or dealer reflected, recorded, or included in an account with respect to which, for three successive years, all statements of account or other communications which have been sent, via first class mail, to the customer at his last known address have been returned to such broker, dealer or nominee by the postal authorities for inability to locate the customer, and no written communication has been received from the customer by such broker, dealer or nominee, provided such security was received or is held in this state by such broker, dealer or nominee or the last known address of the customer is located in this state.

5. Any wages held and payable on or after July first, nineteen hundred sixty-six by a broker or dealer, as defined in section five hundred ten of this article, for the

benefit of a person or persons, known or unknown shall be deemed to be abandoned property, where for three successive years:

(a) All such wages have remained unpaid to such person, and

(b) No written communication has been received from such person by the holder, and

(c) Notice regarding such wages, if sent by the broker or dealer, via first class mail, to such person at his last known address has been returned to the broker or dealer by the postal authorities for inability to locate such person.

6. Any broker or dealer who satisfies the requirements of this subdivision may determine the property which on the thirty-first day of December in the years nineteen hundred seventy-two, nineteen hundred seventy-three, nineteen hundred seventy-four and nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine, and nineteen hundred seventy by the method hereinafter in this subdivision described and the amount so determined as at any such date shall be deemed to be all of such abandoned property held by such broker or dealer pursuant to subdivisions one and three of this section on such date.

The broker or dealer shall compute separately for each of the years nineteen hundred sixty-five and nineteen hundred sixty-six (each of which years is referred to in this subdivision as a "base year") the total value of all

stock and cash dividends received by such broker or dealer, or nominee of such broker or dealer, in this state during such year as the holder of record of a security. The value of any dividend paid in stock shall be the mean price of such stock during the calendar month in which the dividend was received as reported by any generally recognized statistical service or, if not so reported, as established in any other manner satisfactory to the state comptroller. The total value of all such stock and cash dividends thus determined for each base year shall be the denominator for that base year. The broker or dealer shall then determine the total value of all such dividends received during each base year belonging to unknown owners as reported to the state comptroller, or as required to be so reported pursuant to this article, which continued to be held by such broker or dealer, or nominee of such broker or dealer, unpaid to the person entitled thereto on the December thirty-first occurring five years after the close of such base year. To the extent any such dividends which continued to be so held unpaid on any such December thirty-first consisted of stock, such stock shall be valued at the mean price of such stock during the calendar month ending on such December thirty-first as reported by any generally recognized statistical service or, if not so reported, as established in any other manner satisfactory to the state comptroller. The total value of such remaining dividends thus determined for each base year shall be the numerator for that base year. The sum of the numerators for the base years shall be divided by the sum of the denominators for the base years and the result thus obtained shall be multiplied by two. The product obtained as the result of such multiplication shall be the average factor of such broker or dealer.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-two shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-seven the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-two in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-seven but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-two in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-seven but, according to the

books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-seven on the thirty-first day of December nineteen hundred seventy-two.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nieteen hundred sixty-eight as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-three in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-eight but, according to the books and records of such broker or dealer, were not received, and (iii) the

aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-three in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-eight but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight on the thirty-first day of December, nineteen hundred seventy-three.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-four shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-nine the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such

broker or dealer, in this state during nineteen hundred sixty-nine as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-four in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-nine but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-four in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-nine but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the proceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-nine on the thirty-first day of December nineteen hundred seventy-four.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred seventy the broker or dealer shall deter-

mine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred seventy as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred seventy as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-five in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred seventy but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-five in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred seventy but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to

subdivisions one and three of this section relating to the year nineteen hundred seventy on the thirty-first day of December, nineteen hundred seventy-five.

Each broker or dealer which uses the procedure described above in the subdivision shall maintain for a period of not less than six years commencing January first, nineteen hundred seventy-two, books and records evidencing the receipt of dividends in this state for each of the base years, and the payment thereof over the five years succeeding each base year.

Any broker or dealer who chooses to determine the property wihch on the thirty-first day of December in the years nineteen hundred seventy-two or nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-seven or nineteen hundred sixty-eight by the method described in this subdivision shall thereafter determine the property which on the thirty-first day of December in each subsequent year ending not later than December thirty-first, nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to a year not later than nineteen hundred seventy by the method described in this subdivision. No broker or dealer may choose to determine the property which on the thirty-first day of December in the years nineteen hundred seventy-four or nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-nine or nineteen hundred seventy by the method described in this subdivision unless such broker or dealer shall have

used the method described in this subdivision to determine the property which on the thirty-first day of December in the year nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight.

The method of determining abandoned property pursuant to subdivisions one and three of this section as described in this subdivision shall be available only to such brokers or dealers as have made written reports pursuant to section five hundred thirteen in each of the years nineteen hundred seventy-one and nineteen hundred seventy-two covering each of the base years.

In the event that an audit of a broker or dealer by the state comptroller establishes that one or more of the dollar values determined by the broker or dealer for the purpose of computing the average factor of such broker or dealer pursuant to this subdivision was incorrect, the corrected average factor of such broker or dealer established as a result of such audit shall be determined to be the average factor required to be used by such broker or dealer in determining abandoned property pursuant to this subdivision.

Any broker or dealer who does not determine abandoned property pursuant to subdivisions one and three of this section by the method described in this subdivision and who during any of the calendar years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy received in this state any stock dividend as the holder of record of a security for a person or persons unknown to such broker

or dealer and who sold any such stock dividend during any such or subsequent calendar year, shall pay the proceeds of such sale to the state comptroller not later than the thirty-first day of December, nineteen hundred seventy-three and such proceeds shall, for all purposes of this chapter be deemed abandoned property on the thirty-first day of December of the calendar year during which such sale takes place.

(Added L.1952, c. 461, § 1; amended L.1963, c. 815, § 6; L. 1965, c. 539, § 5; L.1972, c. 23, § 2; L.1973, c. 617, §§ 2, 6; L.1980, c. 46, § 5; L.1983, c. 767, §§ 3, 4.)

§ 512. Payment or delivery of abandoned property

1. In the month of March of each year, and on or before the tenth day thereof, every broker or dealer shall pay or deliver to the state comptroller all property which on the preceding thirty-first day of December was deemed abandoned property pursuant to section five hundred eleven excepting such property as since that date has ceased to be abandoned.

2. Where any security delivered to the state comptroller pursuant to subdivision one hereof, is delivered by him to the issuing corporation, the security shall be transferred to him on the books of the corporation and a certificate registered in the name of the state comptroller shall be delivered to him. The corporation and its transfer agent, registrar or other person acting for or on behalf of the corporation in executing or delivering such certificate shall be relieved from liability to any person for any losses or damages resulting from the issuance and delivery to the state comptroller of such certificate.

(Added L.1952, c. 461, § 1; amended L.1963, c. 815, § 7; L.1973, c. 213, § 1; L.1974, c. 382, § 1.)

§ 513. Report to accompany payment or delivery

A payment or delivery pursuant to section five hundred twelve shall be accompanied by a verified written report, in such form as the state comptroller may prescribe, setting forth:

1. With reference to any amount specified in subdivision one of section five hundred eleven,

(a) A description of the security,

(b) The number of shares represented or the face amount of the security,

(c) The date the dividend or interest was payable, and

(d) Such other information as the state comptroller may require.

2. With reference to any amount specified in subdivision two of section five hundred eleven,

(a) The name and last known address, if any, of the customer entitled to such amount,

(b) The date of the last entry, other than the credit of interest or dividends, in the account in which such amount is reflected, recorded or included, and

(c) Such other information as the state comptroller may require.

3. With reference to any security specified in subdivision three or four of section five hundred eleven,

(a) A description of the abandoned security,

(b) The number of shares represented or the face amount of the security,

(c) The name and last known address, if any, of the peron appearing to be entitled to such abandoned property, and

(d) Such other information as the state comptroller may require.

4. In case any broker or dealer shall on the thirty-first day of December in any year neither hold nor owe any abandoned property specified in section five hundred eleven, such broker or dealer shall on or before the tenth day of March next succeeeding make a verified written report to the State Comptroller so stating.

5. In case any broker or dealer determines the property which shall be deemed abandoned property pursuant to subdivisions one and three of section five hundred eleven by the method provided in subdivision six of that section, the payment of such abandoned property shall be accompanied by a verified written report, in such form as the state comptroller may prescribe, which among other things, shall set forth the computation of the average factor of such broker or dealer pursuant to subdivision six of section five hundred eleven. Each verified written report accompanying the payment of abandoned property determined pursuant to subdivision six of section five hundred eleven shall contain an undertaking by the broker or dealer making such payment to honor all claims to the extent herein provided whenever made against such broker or dealer by any person determined by him or proved to be entitled to receive from him a stock or cash dividend received in this state during the calendar year covered by such report as the holder of record of a security or an interest payment on a security received in this state during

such year. Such undertaking shall obligate the broker or dealer to honor any such claim provided that the payment of abandoned property relating to the year in question determined pursuant to subdivision six of section five hundred eleven made by such broker or dealer to the state comptroller has been exhausted as a result ow reimbursements by the state comptroller to the broker or dealer or to other persons claiming such abandoned property as provided in subdivision two of section five hundred fourteen. To the extent related to any stock dividend, any such claim shall not exceed the fair market value of such stock dividend on the thirty-first day of December of the year in which such stock dividend was deemed abandoned property. (Added L.1952, c. 461, § 1; amended L.1963, c. 815, § 8; L.1965, c. 539, § 6; L.1973, c. 617, § 3.)

§ 513-a. Retention of books and records

1. Every broker or dealer shall retain the books and records set forth in subdivision two of this section relating to the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine and nineteen hundred seventy for a period of ten years following the end of the year in which created; shall retain all such books and records relating to the year nineteen hundred seventy-one for a period of nine years following the close of nineteen hundred seventy-one; and shall retain all such books and records relating to any subsequent calendar year for a period of eight years following the end of the year in which created. The books and records so retained shall be made available to the state comptroller upon his request in the performance of his duties under this chapter.

2. The following books and records shall be those referred to in subdivision one of this section: general ledgers,

customers ledgers; daily and weekly stock position records; dividend sheets; cash blotters; purchase and sales blotters; daily journals; bank reconciliations; cancelled checks; claim letters; independent auditor's reports; trial balances; private ledgers; financial statements and supporting data; chart of accounts; and copies of abandoned property reports. (Added L.1973, c. 617, § 4.)

§ 514. Reimbursement of brokers or dealers

1. A broker or dealer which has paid or delivered to the state comptroller abandoned property pursuant to section five hundred twelve may elect to make payment to the person entitled thereto. A broker or dealer making such payment may file claim for reimbursement by the state comptroller. The state comptroller upon satifactory proof of such payment shall, after audit, reimburse such broker or dealer. In no event, however, shall such reimbursement exceed the amount to which the claimant is entitled pursuant to subdivision two of section fourteen hundred three of this chapter.

2. A broker or dealer which has paid to the state comptroller abandoned property relating to any of the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy, determined pursuant to subdivision six of section five hundred eleven, may elect thereafter to make payment to a person entitled to receive (i) a stock or cash dividend received in this state during any such year by such broker or dealer, or nominee of such broker or dealer, as the holder of record of a security, or (ii) an interest payment on a security received in this state during any

such year by such broker or dealer, or nominee of such broker or dealer. A broker or dealer making any such payment may file claim for reimbursement by the state comptroller. Subject to the provisions of this subdivision, the state comptroller upon satisfactory proof that a broker or dealer has made payment to the person entitled thereto shall, after audit of such claim, reimburse such broker or dealer. In no event shall the amount or amounts reimbursed by the state comptroller to a broker or dealer relating to any of the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy, plus amounts paid by the state comptroller to any person claiming such abandoned property relating to any of such years, exceed the amount paid by the broker or dealer to the state comptroller pursuant to subdivision six of section five hundred eleven relating to such year. In no event shall the amount paid by the state comptroller to any person claiming a stock dividend received by a broker or dealer, or nominee of such broker or dealer, in any of such years, or to a broker or dealer in reimbursement of any such claim paid by such broker or dealer, exceed the value of such stock dividend as most recently reported by any generally recognized statistical service on the thirty-first day of December of the year in which such stock was deemed abandoned property. (Added L.1952, c. 461, § 1; amended L.1963, c. 815, § 9; L.1968, c. 663, § 2; L.1973, c. 617, § 5.)

• • •

Article XIV—General Provisions

• • •

§ 1404. Assumption of liability by the state; return of property erroneously paid to state comptroller.

1. The care and custody, subject only to the duty of conversion prescribed in section fourteen hundred two of this chapter, of all abandoned property heretofore paid to the state, except

(i) abandoned property in individual amounts of less than one dollar so paid pursuant to chapter one hundred seven of the laws of nineteen hundred forty-two; and of all abandoned property paid to the state comptroller pursuant to this chapter;

(ii) abandoned property so paid pursuant to chapter seven hundred twenty-seven of the laws of nineteen hundred twenty-six, or as such chapter was amended by chapter five hundred sixty-nine of the laws of nineteen hundred twenty-seven, and section sixty of chapter fifty-four of the laws of nineteen hundred twenty-nine, prior to June first, nineteen hundred forty-one; is hereby assumed for the benefit of those entitled to receive the same, and the state shall hold itself responsible for the payment of all claims established thereto pursuant to law, less any lawful deductions, which cannot be paid from the abandoned property fund.

2. Any person, copartnership, unincorporated association or corporation making a payment of or delivering abandoned property to the comptroller shall immediately and thereafter be relieved and held harmless from any or all liability for any claim or claims which exist at such time with reference to such abandoned property or which may thereafter be made or may come into existence on account of or in respect of any such abandoned property.

3. No action shall be maintained against any person, copartnership, unincorporated association or corporation, or any officer thereof, for

(a) the recovery of abandoned property paid or delivered to the state comptroller pursuant to this chapter or for interest thereon subsequent to the date of the report of such abandoned property to the state comptroller pursuant to this chapter;

(b) the recovery of abandoned property heretofore paid or delivered to the state or for interest thereon subsequent to the date of such payment or delivery; or

(c) damages alleged to have resulted from any such payment or delivery.

4. Whenever it appears to the satisfaction of the state comptroller that because of some mistake of fact, error in calculation or erroneous interpretation of a statute, any person has paid or delivered to the state comptroller, pursuant to any provision of this chapter, any moneys or other property not required by the provisions of this chapter to be so paid or delivered, he shall have power, during the six years immediately succeeding such erroneous payment or delivery, to refund or redeliver such moneys or other property to such person; provided that such moneys or property shall not have been paid or delivered to a claimant or otherwise disposed of in accordance with the provisions of this article. Moneys or other property deposited with a county treasurer or the commissioner of finance of the city of New York for the benefit of an infant pursuant to court order, which are or have been erroneously paid or delivered to the state comptroller, may be refunded by the state comptroller at any time. Any such refund hereunder shall be paid from the abandoned property fund without the deduction of any service charge.

5. Whenever, because of some mistake of fact, error in calculation or erroneous interpretation of a statute, any person pays or delivers to the state comptroller any moneys or other property not required by the provisions of this chapter to be so paid or delivered, such moneys or other property shall, for the purposes of this article, be deemed to be abandoned property, unless and until refunded or redelivered by the state comptroller to the person who paid or delivered the same to him. (As amended L.1946, c. 658, § 3; L.1946, c. 906, §§ 1, 2; L1963, c. 815, §§ 11, 12; L.1965, c. 539, § 7; L.1968, c. 457, § 2; L.1969 c. 407, § 5; L.1978, c. 655, § 5.)

EXHIBIT C

ABANDONED PROPERTY LAW HANDBOOK FOR BROKERS AND DEALERS

1983 EDITION

[SEAL]

EDWARD V. REGAN
STATE COMPTROLLER

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

ALBANY, NEW YORK 12236

[PHOTO]

FOREWORD

The New York State Abandoned Property Law requires the transfer of certain unclaimed property to the custody and protection of the State Comptroller. In order to protect the interests of rightful owners and facilitate the return to them of their property (there is no statute of limitations on owners' claims), specific reporting and refund claim procedures have been established.

This handbook is published to inform brokers and dealers in securities concerning their responsibilities under Article V-A. It will assist in the preparation of related abandoned property reports and explain the procedures to be followed on claims for refunds. We earnestly request your cooperation in following the instructions contained in this handbook.

Brokers and dealers are also subject to other articles of the Abandoned Property Law such as Article V and Article XIII, Section 1315. Reporting responsibilities and instructions relative to Article V and Article XIII, Section 1315 are set forth in a separate issuance.

Questions concerning the preparation of abandoned property reports should be referred to the Office of the State Comptroller, Bureau of Abandoned Property, Governor Alfred E. Smith State Office Building, Albany, New York 12236.

/s/ Edward V. Regan
EDWARD V. REGAN
State Comptroller

* * *

INTRODUCTION

DEFINITION OF BROKERS AND DEALERS

Article V-A of the Abandoned Property Law applies to unclaimed property held by brokers or dealers. The statute defines a "broker" as any individual or corporation engaging in New York in the purchase, sale or exchange of securities for or on behalf of any customer while a "dealer" includes any individual or corporation engaging in New York as a regular business in the purchase, sale or exchange of securities for his or its own account, through a broker or otherwise. The chief distinction between the two is that a "Broker" acts on behalf of a customer in security transactions, whereas a "Dealer" makes transactions as a regular business for his or its own account.

PART 1

DUTIES OF BROKERS AND DEALERS PURSUANT TO ARTICLE V-A OF THE ABANDONED PROPERTY LAW

REPORT AND PAYMENT OR DELIVERY OF ABANDONED PROPERTY

Every broker or dealer must submit to the State Comptroller during the first ten days of the month of March, a report of abandoned property together with a remittance payable to the Comptroiler, State of New York in the total cash amount of the report and the delivery of any securities reported therein.

The report must list all the items which were deemed abandoned property as of December 31 preceding. Items

which thereafter ceased to be abandoned property are to be deleted from the payment and delivery to the State Comptroller by ruling a single line through the entire listed item and indicating to the right of the amount the manner in which such item ceased to be abandoned and the date thereof. Cash items of three dollars and less may be reported in an aggregate amount.

Securities to be delivered to the State Comptroller may be left in their existing registration. It is suggested that securities be sent with the report of abandoned property and remittance by registered mail to the Office of the State Comptroller, Capitol Station Annex, P.O. Box 7009, Albany, New York 12225.

Eligible securities may also be delivered to the State Comptroller by wire transfer to the State's liquidating agent via Depository Trust Company. Prior approval is required and may be obtained together with reporting instructions from the Bureau of Abandoned Property.

Instructions for preparing reports will be found on pages 15 through 20 of this handbook.

NEGATIVE REPORTS

Even though a broker or dealer neither holds nor owes abandoned property on December 31, it is required to make a report. Such negative report is due on or before March 10.

REPORT FORMS

Reports are to be rendered on official forms furnished by the Office of the State Comptroller. To insure a timely and adequate delivery of forms, it is requested that as

soon as practicable after November 30 each broker or dealer inform the State Comptroller as to the approximate number of abandoned property items over $3 to be reported in each of the several established classifications. The classifications of items and the forms to be used for each classification are presented on pages 15 and 16 of this handbook. Requests for forms should be directed to the Office of the State Comptroller, Bureau of Abandoned Property, Governor A. E. Smith State Office Building, Albany, New York 12236. Should the broker or dealer desire to use its own forms (e.g. electronic data processing system print-outs), advance approval must be obtained from the State Comptroller.

PENALTY FOR FAILURE TO REPORT OR FILE

Section 1412 of the Abandoned Property Law provides for a penalty of $100 for each day a full and complete report or affidavit is willfully delayed or withheld.

INTEREST CHARGE FOR LATE PAYMENT OR DELIVERY OF ABANDONED PROPERTY TO THE STATE

Section 1412 of the Abandoned Property Law provides for the payment of interest on any late payment of abandoned property for the period beginning on the date payment was due and concluding on the date payment is made. Interest is at the rate of 6% per annum for any period of lateness prior to June 29, 1981 and at the rate of 10% per annum for any period of lateness on or after June 29, 1981. The interest charge on securities is on its value as determined from the closing price of the securities as of the tenth day of March when delivery was due.

The State Comptroller is authorized by statute to waive the payment of all or part of such interest (or penalty) and to extend the time for making a report or filing an affidavit whenever in his opinion the circumstances warrant it.

PENALTY FOR FRAUDULENT RETURNS

The filing of a willfully false report or the making of a false verification is punishable under the provisions of the Penal Law. (Sec. 1413)

PAYMENT BY BROKERS OR DEALERS TO PERSONS ESTABLISHING RIGHT TO RECEIVE ABANDONED PROPERTY

Abandoned property (unclaimed as of December 31) will be paid by a broker or dealer on or before February 28 (or February 29) to persons satisfactorily establishing their right to receive such property. After February 28 (or February 29), all claims for abandoned property should be presented to the State Comptroller. An item paid by a broker or dealer on or before February 28 (or 29) is removed from the status of abandoned property. It must, however, be listed in the report of abandoned property but shown as deleted by ruling a single line through the entire item and indicating that the item was paid and the date of payment.

* * *

BROKERS AND DEALERS NOT LIABLE AFTER PAYMENT TO THE STATE

The Abandoned Property Law provides that the State assumes liability for the payment of all claims for abandoned property paid to the State.

The law also provides that the broker or dealer making a payment or delivery of abandoned property to the State Comptroller shall not be held liable for any claims in respect to such property. It further provides that no action shall be maintained against a broker or dealer for the recovery of abandoned property paid or delivered to the State Comptroller, or interest thereon, or for damages alleged to have resulted from any such payment. (Sec. 1404)

RETURN OF PROPERTY ERRONEOUSLY PAID TO THE STATE COMPTROLLER

The State Comptroller is empowered to return property within six years after receipt to any person who because of mistake, error in calculation or misinterpretation of the statute, had paid or delivered such property to the State Comptroller. Property erroneously paid or delivered is considered to be abandoned property until refunded or returned by the State Comptroller and no liability attaches to a broker or dealer which makes such an erroneous payment or delivery. (Sec. 1404)

* * *

PART 3

EXPLANATORY COMMENTS ON ARTICLE V-A

ABANDONED PROPERTY LAW

ITEMS DEFINED AS ABANDONED PROPERTY

An unclaimed amount owing by a broker or dealer is deemed abandoned property under one of six classifications established in Section 511. A seventh classification (Sec. 511.6) ceased to be effective after December 31, 1975.

1. The first class includes (a) any cash dividend and bond interest received in this state by a broker or dealer (or nominee) as the holder of record of a security which has remained unpaid to the person or persons entitled thereto for a period of three years following receipt, and (b) cash dividends and bond interest payable on or with respect to a security which has been deemed abandoned. The unpaid amounts in category (a) often occur when the broker or dealer ceases to hold the security at the time of receipt of the dividend or bond interest, the security having already been traded, and the persons or customers entitled to such payment cannot be identified (unknown). The unpaid amounts in category (b) are not subject to a three year waiting period and are reportable as abandoned property, if held, as soon as the security involved has been deemed abandoned or upon receipt, if received thereafter.

   These unpaid amounts are reportable in Schedule A of the Abandoned Property Report (Sec. 511, Subd. 1)

2. The second class includes (a) any cash dividend and bond interest received in this state on or after July first, nineteen hundred seventy-four by a broker or dealer (or nominee) other than as the holder of record of a security which has remained unpaid to the person or persons entitled thereto for a period of three years following receipt, and (b) cash dividends and bond interest payable on or with respect to a security which has been deemed abandoned. The unpaid amounts in category (a) often occur when the broker or dealer receives dividend or bond interest other than from a dividend disbursing agent, but rather from another broker or dealer as a result of an overpayment, and the persons or customers entitled to such payment cannot be identified (unknown). The unpaid amounts in category (b) are not subject to a three year waiting period and are reportable as abandoned property, if held, as soon as the security

involved has been deemed abandoned or upon receipt, if received thereafter.

These unpaid amounts are reportable in Schedule A of the Abandoned Property Report. (Sec. 511, Subd. 1-a)

3. The third class of abandoned property includes any cash and stock distributions due a customer, usually unlocatable, (a) which have remained unpaid to the customer for three years after the date of the last entry in the customer's account other than for an entry of the receipt of dividends or interest due the customer, or (b) on or with respect to a security which has been deemed abandoned. The three year waiting period does not apply to category (b) items which are reportable, if held, as soon as the security involved has been deemed abandoned, or, upon receipt, if received thereafter.

Checks issued by the broker or dealer in payment of such amounts due to customers, which have remained outstanding and uncashed, do not serve to exclude the amounts due customers from being deemed abandoned after the prescribed dormancy periods for the original debts have elapsed. The waiting period aside, the issued, outstanding checks therefore represent the "abandoned" amount due to a customer who, for example, can be an individual investor, another broker or dealer, or a banking organization.

Cash distributions received on unclaimed securities held on behalf of known but unlocated customers are to be reported on Schedule B of the abandoned property report. Stock distributions are always reported on Schedule C of such report. (Sec. 511, Subd. 2)

4. The fourth class consists of any securities held in this state for a customer or unknown person by a broker or dealer (or nominee), as the holder of record of a security where for three successive years, all amounts paid on the security by such broker or dealer (or nominee) have remained unclaimed. This class also includes any stock dividends received on such securi-

ties. These dividends are deemed abandoned when received. This class of unclaimed property generally results from an inability to identify the owner of the security, to locate the owner of a dormant customer account or to have a customer accept delivery of his securities or amounts paid thereon to which he is entitled. The unknown owner situation often occurs as discussed in subparagraph 1 above when a stock dividend is received by the broker or dealer after the underlying security had already been traded and delivered.

These securities are to be reported in Schedule C of the abandoned property report. (Sec. 511).

However, if at any time within the three years preceding the thirty-first day of December in any year, a broker or dealer has received from his customer evidence in writing indicating that the customer is aware of the existence of the account in which the unclaimed amount or security is recorded, then such unclaimed amount or security and the balance in the account shall not be deemed abandoned property. The three year dormancy period preceding abandonment recommences with each such written contact. (Sec. 511, Subd. 3, last paragraph)

5. The fifth class consists of any securities held by a broker or dealer (or nominee) recorded or included in an account where for three successive years, all statements of account or other communications which have been sent, via first class mail, to the customer at his last known address have been returned to such broker or dealer (or nominee) by the postal authorities for inability to locate the customer and no written communication has been received from the customer. Securities in this class must have been received in this state or be held in this state or belong to a customer whose last known address is in this state. This class also includes any stock dividends received on such securities. These dividends are deemed abandoned when received.

Securities in this class are different from those in the fourth class in that they need not have been received by the broker or dealer (or nominee) as the holder of record and, therefore, need not represent a dividend or security distribution on an existing security position. Also, the security need not to have been held in this state if it was received in this state or is due a customer with a last known address in this state.

If there has been no written contact with the customer for a period of three years, whether or not statements and other written communications have been sent to the customer or such communications have been returned undelivered by the post office, the account is considered dormant and securities due to the customer are deemed abandoned.

These securities are to be reported in the Schedule C of the abandoned property report. (Sec. 511. Subd. 4)

6. The sixth class of abandoned property consists of any unpaid wages payable on or after July first, nineteen hundred sixty-six due to a person, known or unknown, where for three successive years (a) such wages have remained unpaid, (b) no written communication has been received from such person and (c) notice regarding such wages sent via first class mail to such person at his last known address has been returned by the postal authorities for inability to locate such person. Care should be taken to include in unclaimed wages all checks issued for services rendered, under contract or otherwise, e.g. sales commissions, which have remained uncashed and outstanding for the three year period preceding abandonment.

The sending of first class notice referred to in subparagraph 6. (c), above, while desirable, is not a mandatory requirement under this provision nor does an election by the broker or dealer not to send such notice serve to exclude wages unpaid for three years from being deemed abandoned property. (Sec. 511, Subd. 5)

With further respect to balances due customers, only those items due a customer who entered into a broker and customer relationship in this state are subject to the statute. An isolated transaction wherein an office in this state received items for the account of a customer who entered into the broker-customer relationship in another state is not within the purview of this article. When an account with a customer is maintained on the books of a broker or dealer at an office in this state, it shall be presumed that such customer entered into a contract in this state with such broker or dealer, unless it be established by evidence that the contract giving rise to the relationship was made outside of this state. Moreover, items received as the holder of record of a security which a broker or dealer ceased to actually hold prior to receipt of the item, are deemed abandoned property (if unpaid to the entitled customer for three years) if received in this state, without regard to the location of the office in which the original transaction in respect to the security may have occurred. (Sec. 510, Subd. 6, par. b and Sec. 511, Subd. 1)

* * *

No. ——— Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK

Defendant.

PROOF OF SERVICE

I, RICHARD L. SUTTON, certify that I am counsel of record for plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 9th day of February, 1988, I served copies of the foregoing Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint, on all parties required to be served by depositing such copies, first class postage prepaid, in a United States Post Office, addressed as follows:

The Honorable Mario M. Cuomo
Governor of the State of New York
New York State Capitol
Eagle & Washington Avenues
Albany, NY 12224

The Honorable Robert Abrams
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, NY 10271

I further certify that copies of said Motion, Complaint and Brief have been mailed to the remaining states, as stated in Paragraph 5 of said Complaint, by mailing copies by United States mail, first class postage prepaid, to the Attorneys General of each of such states.

RICHARD L. SUTTON
Counsel of Record for Plaintiff,
the State of Delaware
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
P. O. Box 1347
Wilmington, DE 19899
(302) 658-9200

No. 111 Original

(2)

Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

vs.

STATE OF NEW YORK,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

May 9, 1988

63 pp

Questions Presented

1. Is this case ripe in light of Delaware's failure to exercise its right to make a claim under New York's abandoned property law, as other states do, for any dividends which it can identify as having been abandoned by creditor brokers with Delaware addresses, as shown on the books and records of the brokers holding the unclaimed dividends, or by creditor brokers whose addresses cannot be determined from those records?

2. Should Delaware exhaust available administrative procedures for reviewing any possible adverse determinations on its claims to abandoned property?

3. Should this Court decline to exercise jurisdiction in a case which involves only complicated factual questions requiring time-consuming and costly reconstruction of millions of transactions and which raises no serious concerns of federalism?

4. Is New York entitled to custody of dividend and interest overpayments abandoned by creditor brokers which have New York addresses as shown by the books and records of debtor brokers?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	v
Statement of the Case	1
1. The rule in *Texas v. New Jersey* and *Pennsylvania v. New York*	2
2. The overpayments abandoned by creditor brokers with New York addresses	3
a. How overpayments arice	4
b. Proportion of New York, Delaware, and unknown creditor addresses	7
c. Reconstruction of overpayment transactions	8
3. Custody of overpayments by creditor brokers	8
4. The New York claims procedure for abandoned property used by other states	10
Summary of Argument	12
ARGUMENT	
I. THIS CASE IS NOT RIPE UNTIL DELAWARE HAS EMPLOYED THE NEW YORK CLAIMS PROCEDURE USED BY OTHER STATES	14
II. DELAWARE HAS FAILED TO EXHAUST NEW YORK'S PROCEDURE FOR REVIEWING CLAIM DETERMINATIONS	17

	Page
III. THIS COURT SHOULD DECLINE TO EXERCISE ORIGINAL JURISDICTION BECAUSE THE CASE RAISES SOLELY FACTUAL QUESTIONS	20
A. Absent any effort by Delaware to seek a mutual accomodation, this Court should decline to exercise jurisdiction	20
B. This Court declines to exercise original jurisdiction when the case presents largely factual, rather than serious federal, questions	22
C. Adequate alternative forums are available	25
IV. NEW YORK IS ENTITLED TO ALL UNCLAIMED DIVIDENDS ABANDONED BY CREDITOR BROKERS WHICH HAVE NEW YORK ADDRESSES	29
Conclusion	32
EXHIBITS	
Affidavit of Robert Griffin, dated May 9, 1988 (Exhibit A)	A-1
Exhibit I (cashier daily delivery ticket) (sales)	A-8
Exhibit II (cashier daily delivery ticket) (buys)	A-10
Exhibit III (weekly stock record)	A-11
Exhibit IV (dividend position sheet)	A-12
Exhibit V (standard reciprocity agreement)	A-14
Affidavit of Herbert M. Friedman, dated April 29, 1988 (Exhibit B)	A-17

TABLE OF AUTHORITIES

CASES	Page
Abbott Laboratories v. Gardner, 387 U.S. 136 (1967)	14, 15-16
Agins v. Tiburon, 447 U.S. 255 (1980)	15
Alabama v. Arizona, 291 U.S. 286 (1934)	14
Arizona v. New Mexico, 425 U.S. 794 (1976) (per curiam)	25, 26, 27, 29
Arkansas v. Texas, 346 U.S. 368 (1953)	16
Baldwin v. State of Missouri, 281 U.S. 586 (1930)	2
Blanchette v. Connecticut General Insurance Corps., 419 U.S. 102 (1974) (Regional Rail Reorganization Cases)	14
Blodgett v. Silberman, 277 U.S. 1 (1928)	2
California v. Texas, 457 U.S. 164 (1982) (per curiam)	24
California v. West Virginia, 454 U.S. 1027 (1981)	23, 25
Colorado v. Kansas, 320 U.S. 383 (1943)	21
Connecticut Mutual Life Ins. Co. v. Moore, 297 N.Y. 1, 74 N.E.2d 24 (1947), *aff'd*, 333 U.S. 541 (1948)	8
Farmers' Loan & Trust Co. v. State of Minnesota, 280 U.S. 204 (1930)	2
Gilchrist v. Interborough Rapid Transit Co., 279 U.S. 159 (1929)	18
Herb v. Pitcairn, 324 U.S. 117 (1945)	16

	Page
Hodel v. Indiana, 452 U.S. 314 (1981)	15
Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)	15
Idaho ex rel. Evans v. Oregon, 444 U.S. 380 (1980)	21-22, 29
Illinois Commerce Commission v. Thompson, 318 U.S. 675 (1943)	18
Illinois v. City of Milwaukee, 406 U.S. 91 (1972)	23
Louisiana ex rel. Jones v. Bowles, 322 U.S. 707 (1943) (per curiam)	25-26
Louisiana v. Cummins, 314 U.S. 580 (1941) (per curiam)	26
Louisiana v. Texas, 176 U.S. 1 (1900)	21
Maryland v. Louisiana, 451 U.S. 725 (1981)	23, 24, 27, 28, 29
Massachusetts v. Mellon, 262 U.S. 447 (1923)	26
Massachusetts v. Missouri, 308 U.S. 1 (1939)	26
McKart v. United States, 395 U.S. 185 (1969)	18-19
Minnesota v. Wisconsin, 252 U.S. 273 (1919)	21
Moufang v. State of New York, 295 N.Y. 121, 65 N.E.2d 321 (1946)	8
Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41 (1938)	18
Natural Gas Pipeline Co. v. Slattery, 302 U.S. 300 (1937)	18

	Page
Nebraska v. Wyoming, 325 U.S. 589 (1945)	21, 22
Nevada v. Hall, 440 U.S. 410 (1979)	26-27
New York v. New Jersey, 256 U.S. 296 (1921)	21
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971)	19, 21, 23, 24, 25, 26, 29
Oklahoma v. Atchinson, T. & S.F.R.R., 220 U.S. 277 (1911)	26
Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983)	16
Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978)	15
Pennell v. City of San Jose, 108 S. Ct. 849 (1988)	15
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Public Service Commission v. Wycoff Co., 344 U.S. 237 (1952)	18
State ex rel. Dyer v. Sims, 341 U.S. 22 (1951)	21
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*
Texas v. New Mexico, 462 U.S. 55 (1983)	21, 23
Thomas v. Union Carbide Agricultural Products Co., 473 U.S. 568 (1985)	14-15, 15-16
Tuck v. Heckscher, 65 Misc. 2d 1059, 320 N.Y.2d 419, *aff'd*, 37 A.D.2d 558, 323 N.Y.S.2d 659, *aff'd*, 29 N.Y.2d 288, 277 N.E.2d 402, 327 N.Y.S.2d 351 (1971)	28
United States v. Nevada, 412 U.S. 534 (1973)	25

	Page
Utah v. United States, 394 U.S. 89 (1969) (per curiam)	23
Vermont v. New York, 417 U.S. 270 (1974) (per curiam)	21
Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam)	28
Washington v. Oregon, 214 U.S. 204 (1909)	21
Western Union Co. v. Pennsylvania, 368 U.S. 71 (1961)	24, 25, 29
Williamson County Regional Planning Commission v.. Hamilton Bank of Johnson City, 473 U.S. 172 (1985)	15
CONSTITUTIONAL AND STATUTORY PROVISIONS:	
FEDERAL:	
U.S. Const. art. III	14
U.S. Const. art. III, § 2	22
U.S. Const. art. III, § 2, cl. 2	23
28 U.S.C. § 1251(a) (1982)	22, 23
28 U.S.C. § 1251(a)(1) (1982)	23
28 U.S.C. § 1257 (2) (1982)	26
STATE:	
Act of Jan. 1, 1973, ch. 617, § 1, 1973 N.Y. Laws 1124	10
N.Y. Aband. Prop. Law § 102 (McKinney Supp. 1988)	8
N.Y. Aband. Prop. Law §§ 510-14 (McKinney Supp. 1988)	9

	Page
N.Y. Aband. Prop. Law § 510(4) (McKinney Supp. 1988)	9
N.Y. Aband. Prop. Law § 510(5) (McKinney Supp. 1988)	9
N.Y. Aband. Prop. Law § 510(7) (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 511 (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 512 (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 512(1) (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 513(2)(a) (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 513(3)(c) (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 513-a (McKinney Supp. 1988)	10
N.Y. Aband. Prop. Law § 1401 (McKinney 1944)	9
N.Y. Aband. Prop. Law § 1402 (McKinney Supp. 1988)	9
N.Y. Aband. Prop. Law § 1404 (McKinney Supp. 1988)	9
N.Y. Aband. Prop. Law § 1406(1) (McKinney Supp. 1988)	10-11
N.Y. Aband. Prop. Law § 1406(1)(a) (McKinney Supp. 1988)	11, 14

Page

N.Y. Aband. Prop. Law § 1406(1)(b) (Mckinney Supp. 1988) 11, 17

N.Y. Aband. Prop. Law § 1406(1)(c) (McKinney Supp. 1944) 11, 17

N.Y. Aband. Prop. Law § 1417 (McKinney Supp. 1988) 10, 11

N.Y. Civ. Prac. L. & R. § 6301 (McKinney 1980) 28

N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1988) 11

N.Y. Civ. Prac. L. & R. § 7805 (McKinney 1981) 28

REGULATIONS:

N.Y. Comp. Codes R. & Regs. tit. 2, § 119 (1986) 11, 17

N.Y. Comp. Codes R. & Regs. tit. 2, § 119.9 (1986) 11

OTHER AUTHORITIES:

Committee on Stock Brokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* (1973) 5

4 Davis, K., *Administrative Law Treatise* (2d ed. 1983) 19

	Page
The E-Z Telephone Directory of Brokers and Banks (1986)	8
New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* (1979)	5
Office of Unclaimed Funds, New York Comptroller, *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988)	9, 10
Report of Lead Counsel, *Prudential Insurance Company of America v. Alabama*, No.C4937-83E (N.J. Super. Ct. Ch. Div. Filed Nov. 23, 1983)	31
Report to the Governor on Legislation, by Louis R. Tomson, Counsel to the Comptroller, dated May 30, 1985	11
Securities Industry Association, *Securities Industry Yearbook 1987-88* (1987)	8
Stern, R., E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	26-27
Wright, C., *The Law of Federal Courts* (1983)	18
13 Wright, C., A. Miller & E. Cooper, *Federal Practice and Procedure* (1984)	15

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

VS.

STATE OF NEW YORK,

Defendant.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT

STATEMENT OF THE CASE

Delaware's proposed complaint demonstrates that it has a profound misunderstanding of the facts of this case as they relate to this Court's decisions in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). It contends that the abandoned property at issue consists of dividend and interest overpayments owed by brokers incorporated in Delaware (debtor brokers) to customers (whose addresses supposedly are unknown) of other brokers and banks. As shown below, however, the overpayments are owed directly to other brokers and banks (creditor brokers), primarily located in New York, who have chosen not to assert claims to the abandoned property. In any event, this case is not ripe, Delaware failed to exhaust available administrative remedies, and exercise of original jurisdiction is not appropriate.

1. The rule in *Texas v. New Jersey* and *Pennsylvania v. New York*

In *Texas v. New Jersey*, this Court established clear rules for determining which states with conflicting claims to intangible personal property are entitled to escheat. In that case, the Court adopted the rule that "since a debt is the property of a creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-81 (footnotes omitted). In adopting this rule, the Court expressly rejected the use of a creditor's domicile to determine which state could escheat:

> We agree with the Master that since *our inquiry is not concerned with the technical domicile of the creditor*, and since ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last-known address.

Id. at 681 n.11 (emphasis supplied).

The rule adopted was "a variation of the old concept of '*mobilia sequuntur personam*,' according to which intangible personal property is found at the domicile of its owner." *Id.* at 680 n.10. Thus, although the rule adopted was "in line" with a group of cases dealing with intangible personal property relying on the domicile of the creditor, it differed by employing last-known address as a substitute for domicile in the area of escheat. *See, e.g., Baldwin v. State of Missouri*, 281 U.S. 586 (1930); *Farmers' Loan & Trust Co. v. State of Minnesota*, 280 U.S. 204 (1930); *Blodgett v. Silberman*, 277 U.S. 1, 9-10 (1928).[1]

---

[1] The Special Master explained that last known address was more appropriate in escheat cases than domicile:

> In such a proceeding, we are not concerned with litigation by private litigants in which the strict legal domicile of the litigants may be an important factor. We are concerned only with which of the two states shall take possession of property, its only claim thereto being that the lawful owner thereof died without heirs or successors. In such a proceeding, the address given to the debtor corporation should be sufficient to establish situs for escheat purposes.

Report of the Special Master at 24.

This Court gave four reasons for the last known address rule. First, "[a]doption of such a rule involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided." 379 U.S. at 681. Second,

> [i]t takes account of the fact that if the creditor instead of perhaps leaving behind an uncashed check had negotiated the check and left behind the cash, this State would have been the sole possible escheat claimant; in other words, the rule recognizes that the debt was an asset of the creditor.

Id. Third, it "will tend to distribute escheats among the States in proportion of the commercial activities of their residents." *Id.* Fourth, "by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified." *Id.*

The rule applies to all creditors regardless whether the creditor was an individual, partnership, or corporation.[2] By applying to all creditors regardless of legal status, the rule promotes certainty and ease of administration since states need go no further than the records of the debtor corporation to determine which state has the power to escheat the unclaimed property.

If the creditor's address "does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds 'until some other State comes forward with proof that it has a superior right to escheat.' " *Pennsylvania v. New York*, 407 U.S. at 210-11 (quoting *Texas*, 379 U.S. at 582). The state in which the debtor is incorporated has the burden of establishing as to all escheatable items the absence from the debtor's records of an address for the creditor. 407 U.S. at 213.

2. **The overpayments abandoned by creditor brokers with New York addresses**

The abandoned property which Delaware claims consists mainly of dividend and interest overpayments owed by one broker ("debtor

---

[2] In *Texas*, the creditors included many partnerships, companies, and corporations as well as individuals. *See* Copy of Report of the Sun Oil Company to the State of Texas.

broker") to another broker or bank ("creditor broker"). They are not owed to the customers (beneficial owners) of creditor brokers, as Delaware suggests, see proposed complaint at 4, 6-7, because the customers have been fully satisfied by creditor brokers and, therefore, have no right to claim these overpayments. The majority of these creditor brokers have trading addresses in New York, only a few have trading addresses in Delaware.[3]

a. How overpayments arise

The overpayments were made by corporate paying agents of securities issuers to debtor brokers, which held the underlying securities in their own name for their customers (the beneficial owners). The debtor brokers then sold the securities to creditor brokers before the record date.[4] The creditor brokers purchased the securities for their own customers but did not register the certificates before the record date. The creditor brokers have failed to claim the overpayments when the brokers attempted to reconcile their accounts. The debtor brokers left holding the overpayments owed to the creditor brokers have turned over this abandoned property to New York.

Generally, a broker holds securities for its customers in its own name. As of the record date for each security, the broker generates a position sheet or worksheet. This report reflects all of the broker's customer accounts entitled to the dividend payment for that security and the actual amount due each account based on the issuer's

---

[3] Many of the creditors which have chosen not to pursue their claims to the abandoned property at issue are banks, a large number of which are located in New York. Unless otherwise indicated, the discussion which follows concerning how brokers treat overpayments applies equally to banks.

Not all the entities listed at page 3 of the proposed complaint are debtor brokers incorporated in Delaware. The First Boston Corporation is a debtor broker which has been a Massachusetts corporation since 1932. It is owned by a holding company, First Boston Inc., which is incorporated in Delaware.

[4] On the record date for a particular dividend period, the issuer of a security determines the identity of each of its shareholders so that it knows who is entitled to dividends or other distributions for that period. The actual distribution takes place later, on the payable date, often after the underlying security has been sold.

dividend rate. At the payable date, the broker credits each customer's account for the dividend payment payable to each, and sets up a receivable position for the total amount, pending payment from the issuer's paying agent.[5] The customer, usually being fully satisfied on the payable date, is unaware of the transactions between his broker and other brokers and usually never learns of any discrepancies in their accounts with each other.

The corporate paying agent, which usually is a banking institution acting on behalf of the issuer, will also generate a position sheet as of the record date of all shareholders who according to its records are entitled to dividends and will issue dividend checks dated as of the payable date to the broker holding the securities in its own name. The paying agent does not know if the broker is trading for its own account or on behalf of its customers.

When the amount expected to be received by a broker on the payable date equals the amount actually received from the paying agent, no problems arise. This, however, is not always the case. Often brokers are either overpaid or underpaid by the paying agents because of differences between the position sheets of the brokers and the paying agents.

A dividend overpayment can occur as follows. Customer X (a beneficial owner) has a portfolio of 100 shares of IBM with Broker A. Customer X sells the 100 shares before the record date. As of the record date, Broker A generates a position sheet for all its customers with shares of IBM which does not include Customer X because it knows that this customer sold the 100 shares before the record date and, therefore, is not entitled to any dividends.[6]

---

[5] For a more detailed explanation of the mechanics of accounting for dividend distribution by brokers, see Committee on Stockbrokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* 27-29 (1973). New York has lodged a copy of this publication with the Clerk.

[6] It usually takes several business days to transfer the stock after a sale. As a result, the securities industry has established an ex-dividend date, usually four days before the record date. On that date, the stock goes ex-dividend, which means it is sold without a dividend at a discount equal to the dividend. New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* 129-30 (1979). New York has lodged a copy of this publication with the Clerk. The only

(Footnote continued)

Customer Y, who has a portfolio with Broker B, purchased the shares (as a beneficial owner) sold by Customer X. Broker B, however, did not register the shares in its name in time for the paying agent to adjust its records to reflect the change in ownership as of the record date. As a result, the paying agent issued a dividend check to Broker A for the 100 shares sold by Customer X and Broker A has an overpayment. This overpayment is maintained by Broker A in an accounts payable or unclaimed dividend account.

If Broker A kept a record of each purchase and sale between the record dates, the broker could not only anticipate the overpayment, but also identify which customer caused the overpayment (or any underpayment). Once Broker A identifies this customer, the broker should be able to identify who purchased the shares from that customer.

An underpayment is the reverse of the above. Broker B knows that its Customer Y purchased the 100 shares of IBM before the record date and credited Customer Y's account for the dividend on the payable date. Since the purchase was not reflected on a timely basis on the books of the corporate paying agent, Broker A was overpaid and Broker B was underpaid. Customer Y, however, is entirely unaffected by the underpayment because Broker B has credited its customer's account.

Normally, brokers attempt to reconcile their accounts. Broker B determines who the last registered owner of the 100 shares of IBM was and sends in a claim requesting payment. If the claim was in order, Broker A would honor it and send a check to Broker B, thus, eliminating Broker A's overpayment and offsetting Broker B's underpayment.

This, however, is not always the case. The volume of purchases and sales which take place each day is enormous. Brokers are not always able or willing to expend the time and effort needed to research receivable positions and process claims against other brokers. Therefore, in the above example, if the amount of the

---

effect on the above description is that when the stock is sold ex-dividend, the relevant date to determine whether the customer is entitled to a dividend is a few days earlier than the record date. For the sake of simplicity, the discussion uses the record date.

overpayment to Broker A and underpayment to Broker B is small in comparison to the cost of determining which of Broker A's customers sold the shares to which of Broker B's customers, Broker B (the creditor broker) may decide not to pursue the claim to the overpayment held by Broker A (the debtor broker). It is these funds unclaimed by creditor brokers and held by debtor brokers until paid or delivered to the State of New York which Delaware seeks to obtain in this original action.

b. **Proportion of New York, Delaware, and unknown creditors**

Based upon examinations of representative samples of the books and records of debtor brokers, it appears that a significant number of creditor brokers have New York trading addresses and only a few have Delaware trading addresses.[7] For example, one recent limited examination of a representative sample at a typical securities debtor broker failed to disclose *any* sales and possible unclaimed overpayments owed to creditor brokers with non-New York addresses. Another examination at one of the few institutional debtor brokers which conduct business predominantly with brokers located outside New York indicates that the amount of overpayments owed to creditor brokers with New York addresses is likely to be substantial. *See* affidavit of Robert Griffin, Director of Audits, Office of Unclaimed Funds, Office of the Comptroller of the State of New York, dated May 5, 1988 ("Griffin Affidavit") (attached as Exhibit A), at A-1.[8]

These findings are consistent with the structure of the brokerage industry. Few, if any, of the participants in the National Securities Clearing Corporation, a group which includes almost all of the creditor brokers, have Delaware trading addresses. In addition, eighty-four percent of the top 100 creditor brokers ranked by the Securities Industry Association hold 93.6 percent of the total capital

---

[7] The address shown on the debtor's records is the broker's trading address at which it transacts brokerage business with the debtor broker, not the state in which the creditor broker is incorporated.

[8] "A " indicates pages in the printed version of the exhibits attached as an addendum to this brief.

held by all creditor brokers and have trading addresses located in New York; none have Delaware trading addresses.[9]

d. **Reconstruction of overpayment transactions**

In some cases, the position sheets and correspondence between debtor and creditor brokers concerning overpayments are readily available. In those cases, it is possible to determine with respect to most unclaimed overpayments which creditor broker has neglected to claim them. In many cases, however, the methods used to keep those records at the debtor broker are inadequate. In those cases, although it would be possible to reconstruct most of the transactions, the cost and time to do so would be very high. The New York State Comptroller has estimated that it would take 36 of its people working full-time for one year to determine the amounts unclaimed by all the creditor brokers for any one year. *See* Griffin Affidavit at A-5. Thus, although the names and addresses of the creditor brokers appear on the debtor brokers' records and it is feasible to determine the addresses of most of the creditors, generally, neither the debtor brokers nor the State of New York has considered it cost effective in the past to reconstruct these transactions where a significant number of the creditor brokers have New York addresses.

3. **Custody of overpayments abandoned by creditor brokers**

New York's current Abandoned Property Law is the product of a general codification in 1943 of then existing law. In adopting it, the Legislature declared that it was "the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state." N.Y. Aband. Prop. Law § 102 (McKinney Supp. 1988). Thus, the policy of the state is custodial protection, not confiscation. *Connecticut Mutual Life Ins. Co. v. Moore*, 297 N.Y. 1, 8, 74 N.E.2d 24, 26 (1947), *aff'd*, 333 U.S. 541 (1948); *see also Moufang v. State of New York*, 295 N.Y. 121, 127-28, 65 N.E.2d 321, 323 (1946).

---

[9] *See* Securities Industry Association, *Securities Industry Yearbook 1987-88*, at 10-12 (1987); *The E-Z Telephone Directory of Brokers and Banks* (1986) (listing trading addresses).

The Comptroller carries out this custodial responsibility by such steps as maintaining public records of all names and last known addresses of persons appearing to be entitled to abandoned property paid to the State, N.Y. Aband. Prop. Law § 1401 (McKinney 1944), publishing annual reports of property abandoned in the preceding year, N.Y. Aband. Prop. Law § 1402 (McKinney Supp. 1988), assuming liability for payment of claims to abandoned property (see discussion in following section of claims procedure), N.Y. Aband. Prop. § 1404 (McKinney Supp. 1988), and agreeing to hold harmless persons delivering abandoned property to the Comptroller. *Id.* In addition, the Comptroller attempts to locate the true owners of abandoned property through an extensive Outreach Program, including television and radio public service announcements, site visits, direct mailings, posters, and a toll-free number. Office of Unclaimed Funds, New York Comptroller, *Handbook for Reporters of Unclaimed Funds* 30 (2d ed. 1988) ("*Handbook for Reporters of Unclaimed Funds*").[10] In fiscal year 1986 alone, the Comptroller paid over 40,000 claims. *Id.*

Since 1952, the Abandoned Property Law has included provisions specifically applying to unclaimed property held by securities brokers or dealers.[11] N.Y. Aband. Prop. Law §§ 510-14 (McKinney Supp. 1988) (article V-A). Any dividends, profits, or other

---

[10] The excerpts from the *Handbook for Reporters of Unclaimed Funds* attached to the plaintiff's brief are from the first edition and are out of date. New York has lodged a copy of the current version of the *Handbook* with the Clerk.

[11] Section 510 defines brokers and dealers as follows:

> 4. "Broker" shall include any individual or corporation engaging in this state in the purchase, sale or exchange of securities for or on behalf of any customer but shall not include a banking organization as defined in section one hundred three of this chapter.
>
> 5. "Dealer" shall include any individual or corporation engaging in this state as a regular business in the purchase, sale or exchange of securities for his or its own account, through a broker or otherwise, but shall not include a banking organization as defined in section one hundred three of this chapter.

N.Y. Aband. Prop. Law §§ 510(4), (5) (McKinney Supp. 1988).

distributions, paid in stock or cash, and any interest or other payment or principal held by brokers or dealers which remain unclaimed for three years are deemed abandoned property. N.Y. Aband. Prop. Law §§ 510(7), 511 (McKinney Supp. 1988). Each year on March 10, brokers and dealers must deliver to the Comptroller all property which on December 31 of the previous year was deemed abandoned property under section 511 (except for property which has ceased to be abandoned). N.Y. Aband. Prop. Law § 512(1) (McKinney Supp. 1988). Payments and deliveries of abandoned property under section 512 must be accompanied by a report including certain required information such as the name and last known address of the customer entitled to the abandoned property. N.Y. Aband. Prop. Law §§ 513(2)(a), (3)(c) (McKinney Supp. 1988); *Handbook for Reporters*, at 10. Brokers and dealers are obligated to retain books and records relating to such abandoned property for eight years. N.Y. Aband. Prop. Law § 513-a (McKinney Supp. 1988).[a]

4. **The New York claims procedure for abandoned property used by other states**

Under the New York Abandoned Property Law, a state may make a claim for abandoned property in the custody of the Comptroller by making a claim directly under section 1406(1) with the Comptroller and seeking administrative and judicial review of any adverse determination. A state may also enter into a reciprocity agreement pursuant to section 1417, under which the states agree to deliver on an annual basis the unclaimed property owing to the residents of the other.

Section 1406(1) provides that a "[c]laim may be filed with the state comptroller for any abandoned property amounting to over

---

[a] The Legislature adopted this recordkeeping requirement after finding in 1973

> that very special and difficult problems came upon the securities industry during a prolonged period of unanticipated and extremely heavy volume of securities transactions as a result of which various basic records maintained by numerous securities brokers and dealers became inaccurate and unreliable, which condition in turn, caused industry wide record keeping problems.

Act of Jan. 1, 1973, ch. 617, § 1, 1973 N.Y. Laws 1124.

three dollars heretofore paid to the state or hereafter paid or delivered to the state comptroller pursuant to this chapter[.]" N.Y. Aband. Prop. Law § 1406(1)(a) (McKinney Supp. 1988).

This section provides the claimant with full due process protections. The Comptroller possesses "full and complete authority to determine all such claims" and must "forthwith send written notice of such determination to the claimant." N.Y. Aband. Prop. Law § 1406(1)(b) (McKinney Supp. 1988). The claimant "may apply for a hearing and redetermination of his claim" within four months. *Id.* In addition, the Comptroller has provided by regulation for such hearings at which the claimant has the right to be represented by counsel, summon and cross-examine witnesses, and submit legal memoranda. N.Y. Aband. Prop. Law §§ 1406(1)(b), (c) (McKinney 1944 & Supp. 1988); N.Y. Comp. Codes R. & Regs. tit. 2, § 119 (1986). Upon completion of the hearing, the hearing officer must render a decision on the merits, which is subject to judicial review in a special proceeding if the claimant makes an application to the Supreme Court, Albany County, within four months after the decision is mailed. N.Y. Aband. Prop. Law § 1406(1)(b) (McKinney Supp. 1988); N.Y. Comp. Codes R. & Regs. tit. 2, § 119.9 (1986). *See also* N.Y. Civ. Prac. L. & R. § 7801 *et seq.* (McKinney 1981 & Supp. 1988).

Sister states have presented claims for abandoned property directly to the Comptroller under section 1406(1). In recent years, for example, Alaska, Maine, Massachusetts, North Carolina, Texas, Utah, and Virginia have all made such claims. Affidavit of Herbert M. Friedman, dated April 29, 1988 (attached as Exhibit B), at A-18. In the only case in which New York denied a claim, the claimant state elected not to seek further administrative or judicial review. *Id.*

Last year, New York began entering into prospective reciprocity agreements with other states under section 1417 of the Abandoned Property Law.[13] N.Y. Aband. Prop. Law § 1417 (McKinney Supp. 1988). Griffin Affidavit, at A-6. New York has entered into such agreements with Idaho, Massachusetts, Minnesota, North Carolina, North Dakota, Virginia, and Wisconsin and at least ten other states

[13] The bill which ultimately became section 1417 was introduced at the request of the Comptroller. Report to the Governor on Legislation by Louis R. Tomson, Counsel to the Comptroller, dated May 30, 1985.

(not including Delaware) are considering signing such agreements. *Id.* at A-6. Under these agreements, each state agrees that abandoned property in its custody is subject to claims by the true owner at any time, that it will review its annual abandoned property reports to locate property unclaimed by persons or entities whose last known addresses are in the other state, and that it will deliver on an annual basis unclaimed property owed to residents of the other state. A typical reciprocity agreement is attached as Exhibit V to the Griffin Affidavit, at A-14. Each of the states which are parties to these reciprocity agreements deliver unclaimed property owed to individuals and corporations whose last known address is located in the other state. Griffin Affidavit, at A-6.

New York is an active member of the Reciprocal Auditing Task Force ("Task Force") of the National Association of Unclaimed Property Administrators ("NAUPA") along with 26 other states (not including Delaware) which cooperate in obtaining unclaimed property abandoned by each other's residents. *Id.* at A-7. The Director of Audits is the project coordinator of a major effort by the Task Force to gather information on the abandoned property laws of the participating states. *Id.* at A-7. As part of this effort, he sent a questionaire to all 49 other states on March 30, 1988. He has not yet heard from Delaware. *Id.* at A-7. In addition, the Director of Audits has repeatedly invited all states at NAUPA conferences to enter into reciprocity agreements with New York. Delaware has not responded to these invitations. *Id.* at A-7.

Delaware failed to make a claim upon New York for the funds sought here, to enter into a reciprocity agreement, or to attempt to reach a negotiated solution before instituting this original action.

SUMMARY OF ARGUMENT

This case does not belong in this Court. Under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), which Delaware recognizes as the governing law, the state of the creditor's last known address, as shown on the records of debtor corporation holding the abandoned property, is entitled to escheat the property and, if the address of the creditor cannot be determined by examining the debtor's records, the state in which the debtor is incorporated is entitled to escheat the property. The

only issue here is factual. The case does not raise a question which implicates serious concerns of federalism. Adequate alternative forums are available to resolve these factual questions and accepting jurisdiction will overburden this Court's already overcrowded docket.

New York has taken custody of unclaimed dividend and interest overpayments owed by debtor brokers to creditor brokers. Most of these abandoned funds are not owed to the creditor brokers' customers, who should have been fully satisfied in the ordinary course of business. The Comptroller has determined that a large number of the creditor brokers which have abandoned these overpayments have New York addresses and only a few have Delaware addresses.

Thus, the only issue which this Court would have to resolve if it were to take the case is the factual question whether any of the creditor brokers have Delaware addresses or unknown addresses. It is possible, but not practicable, to reconstruct most overpayment transactions, but by employing a sampling technique analogous to the use of a formula approved in *Pennsylvania*, where the cost of reconstructing every transaction was not cost effective, it can be determined which state is entitled to custody of abandoned property.

Alternative forums are available for resolving these factual questions. This Court's decisions demonstrate that Delaware or its State Escheator could pursue the claims for property abandoned by creditor brokers with Delaware addresses or with unknown addresses in state administrative proceedings, with subsequent state court review, or in federal district court.

Moreover, Delaware's failure for 17 years to employ New York's claim procedure, in contrast to other states, or to attempt to negotiate with New York before bringing this original action, demonstrates that the case is not ripe for decision by this Court. Even if Delaware or its Escheator were to present these claims to the Comptroller and exhaust the administrative review procedures, the only issue remaining would be factual—whether New York correctly determined that the address of the creditor broker was located in New York, in Delaware or was unknown. This is not an appropriate issue for this Court.

ARGUMENT

I. THIS CASE IS NOT RIPE UNTIL DELAWARE HAS EMPLOYED THE NEW YORK CLAIMS PROCEDURE USED BY OTHER STATES

This case will not be ripe until Delaware files claims for overpayments abandoned by creditor brokers with the Comptroller under section 1406(1) of the Abandoned Property Law and the Comptroller denies those claims. Delaware has yet to file such a claim, much less receive a denial. Until then, there is no final administrative action which will be judicially reviewable and the entire case is predicated on highly speculative events which may never occur. In addition, until Delaware develops the factual issues further by formulating and presenting a claim and the Comptroller denies a claim, the case is not fit for judicial determination. Moreover, Delaware, which has never presented such a claim in the 17 years its Escheat Law has been in effect, will not suffer any hardship by presenting its claims to abandoned property first to the Comptroller.

The doctrine of ripeness, which is predicated both on article III requirements of a case or controversy and prudential concerns of judicial economy, *see, e.g., Blanchette v. Connecticut General Insurance Corps.*, 419 U.S. 102, 138 (1974) (Regional Rail Reorganization Cases), has special force in original actions. *Alabama v. Arizona*, 291 U.S. 286, 292 (1934) (leave to file an original complaint "will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent"). Indeed, the burden on the state "fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties." *Id.* As shown below, Delaware fails to meet this high standard.

"[R]ipeness is peculiarly a question of timing." *Blanchette*, 419 U.S. at 140. The "basic rationale" of the doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148 (1967). Therefore, a claim is not ripe if it involves " 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' " *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 580-81 (1985) (quoting

13A C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3532 (1984)). Until an agency has made a final determination, administrative action is not judicially reviewable. *Pennell v. City of San Jose*, 108 S. Ct. 849, 856-57 (1988) (taking, due process, and equal protection challenges to rent control ordinances premature in absence of showing that city officials had applied them to plaintiffs); *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985) (developer's taking challenge to zoning regulation not ripe absent final decision by zoning commission and in light of failure to seek compensation through state claims procedures; due process challenge to regulation not ripe until final decision on application to the property);[14] *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 297 (1981) (taking challenge to reclamation statute premature because property owners had not identified any property taken by enactment of that statute nor sought administrative relief); *Hodel v. Indiana*, 452 U.S. 314, 335 n.20 (1981) (due process challenge to reclamation statute's civil penalty provisions premature where plaintiffs failed to show they were ever assessed penalties or suffered any injury); *Agins v. Tiburon*, 447 U.S. 255, 260 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136-37 (1978).

Both " 'the fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration' must inform any analysis of ripeness." *Thomas*, 473 U.S. at 581 (quoting *Abbott*

---

[14] In *Williamson*, this Court explained the distinction between ripeness and exhaustion:

> The question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is judicially reviewable. While the policies underlying the two concepts often overlap, the finality requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate.

473 U.S. at 192-93 (citations omitted).

Laboratories, 387 U.S. at 149).[15] Until the facts are determined, challenge to administrative action is not fit for judicial review when the questions are primarily factual rather than legal. *See Thomas*, 473 U.S. at 581; *Pacific Gas and Electric Company v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190 (1983) (finding ripe the predominantly legal question of preemption of state waste disposal regulations, but not ripe the constitutionality of interim storage regulations which required further factual development). When "postponement of [a] decision would likely work substantial hardship" on the plaintiff, this will militate in favor of finding that the case is ripe. *Pacific Gas and Electric Company*, 461 U.S. at 201-02 (expenditure of millions of dollars over a number of years in building power plants which might never be certified).

These principles demonstrate that Delaware's claim is not ripe. First, until the Comptroller denies a claim by Delaware, there is no final agency action. Second, until there is *some* factual development, the case is not fit for judicial resolution. This has particular force here because Delaware has sought to invoke this Court's original jurisdiction based upon a fundamental misunderstanding about the facts. It has alleged that the abandoned property in the custody of the Comptroller pursuant to article V-A consists of overpayments "as to which the brokers have no identification or last known address of anyone claiming to be the beneficial owner of such property." Proposed complaint, ¶ 3. The identity of the beneficial owners is irrelevant since the overpayments are owed to

---

[15] This Court has treated cases as not ripe and deferred consideration of jurisdictional issues in another original action when state courts could resolve state law issues which might make exercise of its original jurisdiction unnecessary. *See Arkansas v. Texas*, 346 U.S. 368 (1953) (deferring consideration in original action pending outcome of state litigation). *See also Herb v. Pitcairn*, 324 U.S. 117, 128 (1945) (deferring consideration to permit parties to determine in state court whether decision rested on adequate and independent state ground).

The same factors support deferring consideration of jurisdictional issues here as in *Arkansas v. Texas* even though no state court litigation is pending. The critical factor in that case was not that another proceeding was pending but that if the proceeding in the other forum were to resolve "the whole controversy, leaving no federal questions, there will be no occasion for us to proceed further." *Arkansas v. Texas*, 346 U.S. at 371. Similarly, a favorable determination on any of Delaware's claims would make exercise of original jurisdiction unnecessary.

the creditor brokers, not their customers. Moreover, examinations of representative samples of debtor broker records have indicated that many of the addresses of creditor brokers which have abandoned overpayments can be determined and that few of these creditor brokers have Delaware addresses. Indeed, the only questions presented are entirely factual. Finally, Delaware could not even suggest that deferring court consideration until it presented a claim and the Comptroller made a final determination would cause it undue hardship since it has never made a claim and does not allege that it ever instituted escheat proceedings for any of this property.

Unless this Court denies Delaware's motion for leave to file, every time a state contends that another state took custody of abandoned property based on a factual error the claimant state will be entitled to bring an original action in this Court—no matter what size the claim may be—without first making a claim and permitting the state with custody an opportunity to determine the facts and correct any possible error. Indeed, the claimant state could invoke this Court's original jurisdiction even if the state with custody routinely paid all valid claims by other states which satisfied the rule in *Texas* and *Pennsylvania*.

II. DELAWARE HAS FAILED TO EXHAUST NEW YORK'S PROCEDURE FOR REVIEWING CLAIM DETERMINATIONS

New York has an administrative procedure for reviewing and redetermining claim determinations made by the Comptroller which could grant Delaware full relief on its claims. N.Y. Aband. Prop. Law §§ 1406(1)(b), (c) (McKinney 1944 & Supp. 1988); N.Y. Comp. Codes R. & Regs. tit. 2, § 119 (1986). As shown below, requiring Delaware to employ these review and redetermination fair hearing procedures will further many of the most important purposes of the exhaustion doctrine by developing the necessary factual background for judicial decision and by avoiding any need for the Court to act if Delaware's claims are granted, thus, conserving this Court's resources for its primary role as an appellate court. Moreover, none of the factors which courts consider in refusing to require exhaustion apply here.

A party normally is not entitled to judicial relief for an injury until available administrative remedies have been exhausted. *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938). In that case, this Court explained:

> [T]he long settled rule of judicial administration [is] that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.

Id. (footnote omitted). This rule applies in federal courts to state and federal remedies and has special force when state administrative remedies are involved. *Illinois Commerce Commission v. Thompson*, 318 U.S. 675, 686 (1943); *Natural Gas Pipeline Co. v. Slattery*, 302 U.S. 300, 310-11 (1937); *Gilchrist v. Interborough Rapid Transit Co.*, 279 U.S. 159, 208-09 (1929). *See also* C. Wright, *The Law of Federal Courts* 293 (1983) (the rationale for requiring exhaustion of state administrative remedies is that "until the administrative process is complete, it cannot be certain that the party will need judicial relief"). As this Court explained in *Public Service Commission v. Wycoff Co.*, 344 U.S. 237 (1952):

> Even when there is no incipient federal-state conflict, the declaratory judgment procedure will not be used to preempt and prejudge issues that are committed for initial decision to an administrative body or special tribunal any more than it will be used as a substitute for statutory methods of review.
>
> * * *
>
> State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact.

344 U.S. at 246-47.

Requiring Delaware to make a claim and, if the Comptroller were to deny all or part of the claim, to invoke New York's review and redetermination procedure, would further many of the important purposes of the doctrine requiring exhaustion of administrative proceedings as set forth in *McKart v. United States*,

395 U.S. 185, 193-95 (1969): (1) to avoid premature interruption of the administrative process; (2) to enable the agency to develop the necessary factual background upon which the decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures." For example, the administrative process would provide an appropriate forum for Delaware to demonstrate that the address of an abandoning creditor broker does not appear on the records of the debtor or that those records show that the creditor broker's listed address is in Delaware. Exhaustion conserves this Court's scarce resources for its "paramount role as the supreme federal appellate court," *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 505 (1971), both by permitting such factual development and by making unnecessary any judicial review if Delaware establishes its claims.

None of the countervailing factors counsel against exhaustion such as

> irreparable injury to a party from pursuing the adminstrative remedy, clear absence of agency jurisdiction, clear illegality of the agency's position, a dispositive question of law peculiarly within judicial competence, the futility of exhaustion, and expense and awkwardness of the administrative proceeding as compared with inexpensive and efficient judicial disposition of the controversy.

4 K. Davis, *Adminstrative Law Treatise* § 26:1 at 414-15 (2d ed. 1983). Here, there is no danger of an irreparable injury. The dispute is simply about a claim to money which Delaware has never asserted since its escheat statute went into effect in 1971. The Abandoned Property Law and implementing regulations expressly provide that the Comptroller has jurisdiction to review and determine claims to abandoned property in the custody of the Comptroller. This informal hearing procedure is less awkward and far less expensive than an original action.

III. THIS COURT SHOULD DECLINE TO EXERCISE ORIGINAL JURISDICTION BECAUSE THE CASE INVOLVES SOLELY FACTUAL QUESTIONS

This Court will exercise original jurisdiction only when strictly necessary. Thus, it will decline to exercise its exclusive original jurisdiction when adequate alternative forums exist in which the states can raise the same issues, and when the case involves largely questions of fact which do not implicate serious concerns of federalism. Here, Delaware, by failing to make a claim or even to attempt to reach a mutual accomodation with New York before instituting suit, has failed to show that invoking this Court's jurisdiction is absolutely necessary. Even more importantly, this case does not implicate serious concerns of federalism. It raises only factual questions in the application of straightforward rules of law, which can be fully addressed in alternative forums. This Court should, therefore, decline to exercise original jurisdiction in this case and remit the parties to one of those forums.

A. Absent any effort by Delaware to seek a mutual accomodation, this Court should decline to exercise jurisdiction

Delaware failed to contact New York to see if this matter could be resolved without instituting this original action. Simultaneously with the filing of this brief, New York has written directly to Delaware suggesting that the two states negotiate in good faith to resolve this matter and, thus, avoid further litigation in this Court.[*] Under the rules set forth in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), Delaware would be entitled to any property abandoned by creditor brokers with Delaware addresses or abandoned by creditors whose addresses cannot be determined if held by debtor brokers incorporated in Delaware.

This Court has repeatedly emphasized that many disputes between states would be better handled by negotiations and interstate compacts. For example, the Court has declared:

---

[*] New York has lodged with the Clerk a copy of a letter, dated May 9, 1988, from the Attorney General of the State of New York to the Attorney General of Delaware.

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by cooperative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted.

New York v. New Jersey, 256 U.S. 296, 313 (1921). *See also Texas v. New Mexico*, 462 U.S. 554, 567 n.13 (1983); *Vermont v. New York*, 417 U.S. 270, 274 (1974) (per curiam); *State ex rel. Dyer v. Sims*, 341 U.S. 22, 27 (1951); *Colorado v. Kansas*, 320 U.S. 383, 392 (1943); *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1919); *Washington v. Oregon*, 214 U.S. 205, 218 (1909). In *Colorado v. Kansas*, this Court cautioned states about invoking original jurisdiction as a means of settling interstate conflicts, declaring that, despite having jurisdiction over such disputes, "mutual accommodation and agreement should, if possible be the medium of settlement instead of invocation of our adjudicatory power." *Id.* at 392. *See also Nebraska v. Wyoming* 325 U.S. 589, 616 (1945).

In at least two cases, the availability of a negotiated solution appears to have been a consideration in declining to exercise original jurisdiction. In *Louisiana v. Texas*, 176 U.S. 1 (1900), the Court found the absence of a controversy between the two states. It declared that "it is difficult to conceive of a direct issue between two states in respect of a matter where no effort at accommodation has been made." *Id.* at 18. In *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971), the Court also declined to exercise its jurisdiction over a case in which it found that

> granting Ohio's motion for leave to file would, in effect commit this Court's resources to the task of trying to settle a small piece of a much larger problem that many competent adjudicatory and *conciliatory bodies* are actively grappling with on a more practical basis.

401 U.S. at 503 (emphasis supplied).

In contrast, this Court is more likely to exercise its jurisdiction when genuine efforts at settlement have failed. *Idaho ex rel. Evans*

v. Oregon, 444 U.S. 380, 386 (1980) (declining to dismiss original action by Idaho against Oregon and Washington where they "had consistently rebuffed Idaho's attempts to join the Columbia River Fish Compact or to otherwise negotiate some sort of accommodation"); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (proceeding to consider special master's report in case pending for eleven years when efforts at settlement failed). In light of the above, this Court should defer consideration of jurisdiction until the parties have had an opportunity to reach a negotiated solution.

B. This Court declines to exercise original jurisdiction when the case presents largely factual, rather than serious federal, questions

Article III, section 2 of the Constitution defines this Court's original jurisdiction:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction.

This means that in cases "in which a State shall be Party," cases and controversies can be brought directly in this Court without first filing in a lower court (provided that the judicial power of the United States encompasses the dispute).[17]

Congress has defined the Court's exclusive original jurisdiction by statute:

> The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States.

28 U.S.C. § 1251(a) (1982). Despite the express statement that the Supreme Court has "exclusive jurisdiction of all controversies between two or more States," this Court has consistently interpreted its original jurisdiction in *all* cases as discretionary. It has explained:

---

[17] As shown above in Point I, because this case is not yet ripe, this Court lacks jurisdiction.

> In recent years, we have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our original jurisdiction. We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system.

Texas v. New Mexico, 462 U.S. 554, 570 (1983) (citations omitted). *Accord California v. West Virginia*, 454 U.S. 1027 (1981) (declining to exercise exclusive jurisdiction over suit by one state university against another for breach of contract covering athletic games); *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (deciding that original action within exclusive jurisdiction was appropriate). The Court has stated that this original jurisdiction should be "invoked sparingly," *Utah v. United States*, 394 U.S. 89, 95 (1969) (per curiam), and when "justified only by the strictest necessity." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 505.

This Court considers several factors in determining whether to exercise its exclusive original jurisdiction such as the seriousness of the federal questions presented, the complexity of the factual questions, the availability of an adequate alternative forum, and the impact the case will have on its primary role as an appellate court. As demonstrated below, each of these factors mandate declining exercise of jurisdiction here. The Court has explained:

> We have imposed prudential and equitable limitations upon the exercise of our original jurisdiction. As we explained in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972):
>
> "We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer."

California v. Texas, 457 U.S. 164, 168 (1982) (per curiam) (determining that exercise of exclusive jurisdiction was appropriate). In deciding whether the claim is of sufficient "seriousness and dignity," the Court will consider whether it "sufficiently implicate[s] the unique concerns of federalism" which form the basis of its original jurisdiction. *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981).

If the case is extraordinarily complex or would involve extensive factfinding, the Court may decline to take the case. *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 504-05. In the *Ohio* case, Justice Harlan explained as this Court declined to exercise its jurisdiction over a matter which did not involve "difficult or important problems of federal law," *id.* at 504, that it

> found even the simplest sort of interstate pollution case an extremely awkward vehicle to manage. And this case is an extraordinarily complex one both because of the novel scientific issues of fact inherent in it and the multiplicity of governmental agencies already involved. Its successful resolution would require primarily skills of factfinding, conciliation, detailed coordination with — and perhaps not infrequent deference to — other adjudicatory bodies, and close supervision of the technical performance of local industries. We have no claim to such expertise or reason to believe that, were we to adjudicate this case, and others like it, we would not have to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum. Such a serious intrusion on society's interest in our most deliberate and considerate performance of our paramount role as the supreme federal appellate court could, in our view, be justified only by the strictest necessity, and element which is evidently totally lacking in this instance.

Id. at 504-05.

This case does not raise any questions which "sufficiently implicate the unique concerns of federalism" which form the basis of this Court's original jurisdiction. *Maryland v. Louisiana*, 451 U.S. at 743. It involves an application of existing law to a particular set of facts.[8]

---

[8] That existing law can be gleaned from *Western Union Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961), *Texas*, and *Pennsylvania*. In each of those cases, this

(Footnote continued)

The only role for this Court would be to apply these rules to factual issues of great complexity more appropriately resolved in another forum. Thus, as in *California v. West Virginia*, 454 U.S. 1027 (1981), a case which involved no federal questions but only a controversy arising out of an alleged breach of contract governing athletic contests between two state universities, exercise of original jurisdiction here is inappropriate.

The only issues to be resolved are factual. As demonstrated above, the task of determining the identities and addresses of the creditor brokers will involve a huge and lengthy factfinding effort.

C. **Adequate alternative forums are available**

This Court has repeatedly declared that "[w]e seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam). Delaware can resolve the issues in this case either in administrative claims proceedings, with subsequent review by New York courts of any adverse determinations, or in a federal district court.

Delaware can resolve the issues in this case by invoking the administrative and judicial review procedures New York provides in section 1406(1) should the Comptroller deny any of its claims. This Court has declined to exercise its original jurisdiction when the issues raised by the state seeking to invoke it could be resolved by a state agency or a state court. *Arizona v. New Mexico*, 425 U.S. 794 (1976) (per curiam); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971); *Louisiana ex rel. Jones v. Bowles*, 322 U.S. 707 (1943) (per

---

Court was asked to establish the rule which should apply – a question which sufficiently implicated the unique concerns of federalism forming the basis of the Court's original jurisdiction. In *Western Union*, the court suggested that it might refer future disputes to a federal district court. 368 U.S. at 79-80. In *Texas*, the Court took jurisdiction "*to adopt a rule* which will settle the question of which State will be allowed to escheat this intangible property," 379 U.S. at 677 (emphasis supplied), and in *Pennsylvania*, it addressed attempts to modify the rule. This Court should accept jurisdiction in this case only if it wishes to consider altering the rules established in *Western Union*, *Texas*, and *Pennsylvania*. In that event, New York may wish to advance arguments it believes would be germane to that reconsideration.

curiam) (and cases cited); *Louisiana v. Cummins*, 314 U.S. 580 (1941) (per curiam); *Massachusetts v. Missouri*, 308 U.S. 1 (1939); *Massachusetts v. Mellon*, 262 U.S. 447 (1923); *Oklahoma v. Atchinson, T & S.F.R.R.*, 220 U.S. 277 (1911).

The application of this principle in three relatively recent cases demonstrates that Delaware has adequate alternative forums. In *Arizona v. New Mexico*, Arizona brought an original action in its proprietary capacity as a consumer of electricity and as *parens patriae* for its citizens, to challenge New Mexico's electrical energy tax on any electric utility generating electricity in New Mexico. Arizona sought a declaratory judgment that the tax discriminated against interstate commerce. Three Arizona utilities (one of which was a political subdivision of Arizona) affected by the tax had refused to pay and filed suit jointly in a New Mexico court. The Court held that "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." 425 U.S. at 797 (emphasis in original). It added that if the utilities prevailed, Arizona would be vindicated; if they lost, the issues raised could be brought to the Court by way of a direct appeal under 28 U.S.C. § 1257(2).

In *Ohio v. Wyandotte Chemicals Co.*, Ohio filed a bill of complaint invoking the Court's original jurisdiction against private companies incorporated in Michigan, Delaware, and Canada to abate a nuisance causing pollution of Lake Erie. The Court, in declining jurisdiction, explained that several other forums were available to raise the same issues including state courts, state agencies, Canadian provincial agencies, and an international commission.[19] 401 U.S. at 502-03.

---

[19] Similarly, this Court's decision in *Nevada v. Hall*, 440 U.S. 410 (1979), suggests that New York courts could resolve these issues. In *Nevada v. Hall*, this Court held that California courts could render a judgment against Nevada arising out of an automobile collision involving a Nevada state employee driving a state-owned car. Leading commentators argue that

> [t]he logic of that decision presumably would encompass California as a plaintiff if one of its vehicles had been damaged through the fault of the Nevada state employee. It is difficult to suppose Congress meant to allow one state to be sued in the courts of another state when the

(Footnote continued)

As shown below, none of the factors which led this Court in applying these standards in *Maryland v. Louisiana*, 451 U.S. 744 (1981), to conclude that pending state proceedings were inadequate apply here. In that case, several states, joined by the United States and a number of pipeline companies, challenged the constitutionality of Louisiana's first-use tax on certain uses of natural gas brought into that state. This Court denied Louisiana's motion to dismiss, brought on the ground that the constitutional issues could be addressed in certain pending state court actions by Louisiana against the pipeline companies and by the pipeline companies against Louisiana seeking a refund of taxes paid under protest. This Court found five "significant differences" from *Arizona v. New Mexico* which compelled an opposite result. 451 U.S. at 743. First, since one of the three electric companies involved in the state court action in New Mexico was an Arizona political subdivision, that state's interests were actually represented by one of the named parties to the lawsuit. In Maryland, however, none of the plaintiff states were directly represented in the pending proceedings. Second, the Louisiana forum was imperfect, "primarily because no injunctive relief prior to the determination on the merits is possible under Louisiana law." *Id.* at 743 n.19. Third, Arizona had not yet suffered any harm because none of the utilities had paid a tax at the time it moved for leave to file the complaint. Louisiana, however, required payment of the tax during the refund action, plus interest. Fourth, "[t]he tax at issue in the *Arizona* case did not sufficiently implicate the unique concerns of federalism forming the basis of our original jurisdiction." *Id.* at 743. The Louisiana tax did. It affected millions of consumers in over thirty states. Moreover, in contrast to the *Arizona* case, the interests of the United States in administration of the Outer Continental Shelf were directly implicated and a federal district court would be an inadequate forum to address those concerns in the current posture of the case. *Id.* at 744-45.

New York's administrative proceedings and subsequent judicial review fully satisfy the standards in these three cases. Delaware or

---

plaintiff was a private citizen, but not when the plaintiff was the forum state itself.

R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 476-77 (6th ed. 1986).

its State Escheator can receive a full and fair administrative hearing under section 1406(1) of the Abandoned Property Law and section 119 of the Department of Audit and Control regulations. In addition, a claimant is entitled to full judicial review of any redetermination after the fair hearing. No obstacles exist to Delaware seeking injunctive relief from the Comptroller during the pendency of administrative proceedings. Delaware would be entitled to seek injunctive relief pending an appeal from an adverse administrative determination pursuant to N.Y. Civ. Prac. L. & R. §§ 6301, 7805 (McKinney 1980 & 1981). *See Tuck v. Heckscher*, 65 Misc. 2d 1059, 320 N.Y.S.2d 419, 37 A.D.2d 558, 323 N.Y.S.2d 659, *aff'd*, 29 N.Y.2d 288, 327 N.Y.S.2d 351, 277 N.E.2d 402 (1971).[20]

Moreover, the case does not implicate the unique concerns of federalism forming the basis of this Court's jurisdiction. In contrast to *Maryland*, which involved a constitutional challenge with an impact on millions of consumers in thirty states and important national interests, this case involves only a factual determinations in the application of simple rules with an impact on only a few states. Indeed, this case involves just the sort of routine dispute which this Court has repeatedly cautioned was inappropriate for resolution

---

[20] Delaware is not entitled to a preliminary injunction in any event. It has failed to meet its burden to make a clear showing that it is entitled to this extraordinary and drastic remedy. Under the traditional four-part test, the plaintiff must demonstrate that it will be irreparably harmed, that the balance of hardships tips in its favor, that it is likely to succeed on the merits, and that the public interest would be served. *See, e.g., Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921, 925 (D.C. Cir. 1958) (per curiam).

Here, Delaware, which has simply alleged that it would be irreparably harmed, see proposed complaint at 11, could not demonstrate that it will suffer irreparable harm since it waited 17 years to file this original action and since it has an adequate alternative remedy in the form of money damages. The harm to New York, which has relied on this property as a source of revenue for far longer than 17 years, would exceed any conceivable harm to Delaware, which has never made a claim for these funds in 17 years and, apparently, has never instituted escheat proceedings. Indeed, if anything, it would be helped by having New York collect these funds during the course of litigation should it prevail because it is not attempting to do so now. As shown elsewhere, Delaware is not likely to succeed on the merits and the public interest of both states would be served by having New York, the only state which has taken custody of the funds in the past, continue to do so pending the outcome of these proceedings.

in an original action. As Justice Harlan explained, "[c]onsider for example, the frequency with which States and nonresidents clash over the application of state laws concerning taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth. It would, indeed, be anomalous were this Court to be held out as a principal forum for settling such controversies." *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. at 497. *See also Maryland v. Louisiana*, 451 U.S. at 740 n.14, *Arizona v. New Mexico*, 425 U.S. at 798. It would be equally as anomalous if this Court were held out as the principal forum for resolving factual disputes in the distribution of funds when a perfectly adequate forum exists.

The issues in this case also could be resolved by referring this matter to a federal district court. Indeed, this Court suggested just this possibility in *Western Union Co. v. Pennsylvania*, 368 U.S. 71, 79-80 (1961). There, it declared: "Whether and under what circumstances we will exercise our jurisdiction to hear and decide these controversies [between different states over their right to escheat intangibles] ourselves in particular cases, and whether we might under some circumstances refer them to United States District Courts, we need not now determine." 368 U.S. at 79.[2]

IV. NEW YORK IS ENTITLED TO ALL UNCLAIMED DIVIDENDS ABANDONED BY CREDITOR BROKERS WHICH HAVE NEW YORK ADDRESSES

As Delaware recognizes, for nearly a quarter century the rule governing which state may escheat intangible personal property has been clear. Since intangible property is a debt and a debt is the personal property of the creditor, the state of the creditor's last-known address as shown on the debtor corporation's records (not

---

[2] In *dicta*, without citing *Western Union* or any other authority, this Court said in another case that a district court would not have jurisdiction to grant a motion by Idaho to intervene in a suit by Indian Tribes against Oregon and Washington because intervention might convert the suit into a dispute among the states, over which the district court would have no jurisdiction. *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 387 (1980). Nothing in that decision, however, would preclude this Court from referring the issues to a district court for determination, in the same manner as it refers matters to a special master.

the state of the creditor's domicile) has the right to escheat the property. *Pennsylvania v. New York*, 407 U.S. at 210-11; *Texas v. New Jersey*, 379 U.S. at 680-81. Here, the creditors entitled to claim the abandoned overpayments are the creditor brokers—not their customers. Many of the addresses of these creditor brokers appear on the debtor brokers's records. Audits of the debtor brokers conducted by the Comptroller in the past have revealed that a substantial portion of the unclaimed overpayments of the type sought by Delaware apparently were abandoned by creditors with New York addresses. New York is entitled to retain custody of all such funds. Delaware, as the state of the debtor brokers' domicile has the burden of establishing as to all items of abandoned property the absence from the debtor brokers' records of an address for the creditor broker. *Pennsylvania*, 407 U.S. at 213.

To make a complete and accurate determination of all the addresses, however, it would be necessary to reconstruct transactions from all available records. The cost to the states of doing so would be substantial and possibly exceed the small amounts to which Delaware might be entitled. It would be feasible to approximate the aggregate amount of overpayments which were abandoned by creditor brokers with non-New York addresses by examination of representative samples and apportionment on that basis.

Thus, if this Court were to accept jurisdiction, it should employ an approach similar to the technique used in *Pennsylvania v. New York* to determine the addresses of creditors for items where the cost of the search would have exceeded the amount abandoned. In that case, the Special Master recommended that the debtor, Western Union Telegraph Company, conduct a search of its records and tabulate the items regardless whether an address was available or not, both in states which were parties and those which were not. Supplemental Report of Special Master at 3; Recommended Supplemental Decree at 5-6. All the parties agreed, and the Special Master recommended, that the cost of the search should be divided among the states in proportion to the amounts they recovered from the fund. Supplemental Report of the Special Master at 3; Recommended Supplemental Decree at 5. This Court adopted the Supplemental Report on March 19, 1973. 410 U.S. 977.

In *Pennsylvania*, because it would not have been cost effective to search out addresses for small items, the parties all agreed with

the suggestion by Western Union that, rather than doing so, it would merely total these items and divide the total in the same proportion as the larger items were divided. Supplemental Report of the Special Master at 3 n.1. Here, similar considerations of efficiency mandate use of a formula based on representative samples to determine the amount of unclaimed overpayments abandoned each year by creditor brokers with addresses outside New York. Any states entitled to recover would, as in *Pennsylvania v. New York*, share in the cost of preparing and analyzing such samples based on the amount each is entitled to recover.[22]

[22] Forty-nine states employed a similar approach to settle another case in which they allocated unclaimed dividends in proportion to the purchasers of record in each state. This technique was agreed upon due to the difficulty in locating records, the paucity of existing records, the prohibitive expense of reviewing the records, the likelihood that an exhaustive review would fail to yield a more accurate percentage than the agreed upon amount, the substantial time involved to conduct the search of all records, and finally, the likelihood that the cost of the search would exceed the available funds. Report of lead counsel, *Prudential Insurance Company of America v. Alabama*, No. C4937-83E (N.J. Super. Ct. Ch. Div. filed Nov. 23, 1983). New York has lodged a copy of this report with the Clerk.

CONCLUSION

For all the foregoing reasons, this Court should deny the motion for leave to file the complaint or, in the alternative, defer addressing the jurisdictional issue until Delaware has employed the claims procedure established in the New York Abandoned Property Law.

Dated: New York, New York
May 9, 1988

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

EXHIBITS

	Page
Affidavit of Robert Griffin, dated May 9, 1988 (Exhibit A)	A-1
Exhibit I (cashier daily delivery ticket) (sales)	A-8
Exhibit II (cashier daily delivery ticket) (buys)	A-10
Exhibit III (weekly stock record)	A-11
Exhibit IV (dividend position sheet)	A-12
Exhibit V (standard reciprocity agreement)	A-14
Affidavit of Herbert M. Friedman, dated April 29, 1988 (Exhibit B)	A-17

EXHIBIT A

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK :

AFFIDAVIT OF ROBERT GRIFFIN

I, ROBERT GRIFFIN, upon personal knowledge hereby depose and say, under penalties of perjury:

1. I am the Director of Audits, Office of Unclaimed Funds, Office of the New York State Comptroller. I have been the Director of Audits since April 5, 1985, and have extensive experience in auditing the books and records of brokers which have reported unclaimed dividend and interest overpayments ("overpayments") to the Comptroller under article V-A of the New York Abandoned Property Law ("debtor brokers"). The Office of Unclaimed Funds has conducted approximately 21 such audits under my supervision each year since 1985.

2. Based on my experience in conducting and supervising such audits, it is my opinion that in many cases it is possible to determine which creditor broker or banker ("creditor firm") abandoned unclaimed overpayments held by brokers located in New York.

DESCRIPTION OF THE BOOKS AND RECORDS USED TO RECORD OVERPAYMENTS

3. The following is a brief description of the records used by debtor brokers to record overpayments obtained during a recent audit. Examples of the formats of some of these records from a typical broker are attached as exhibits. It should be noted that terminology may differ slightly between brokers.

Cashier daily delivery tickets (sales) (Exhibit I). Each ticket indicates the number of shares delivered (usually physically), the issue, price, trade date, settlement date, delivery date, and, most importantly, the firm to which the shares are delivered and its address. For example, the first sales ticket indicates that Broker X sold 500 shares of Macy common stock at a total price of $21,500 to Asiel & Company at 20 Broad Street, New York, New York. The settlement date and delivery date both were on December 19, 1984. The C.H. number is a code number indicating the creditor firm. The firm name is not always listed, but its C.H. number always is. In this case, the C.H. number is 0370.

Cashier daily delivery tickets (buys) (Exhibit II). Each ticket contains the same information for purchases as the cashier daily delivery tickets for sales. For example, the first ticket indicates that Broker X purchased 8,100 shares of American Motors common stock at a total price of $32,400 from Beauchamp & Co. at 50 Broad Street, New York, New York. The settlement date and delivery date both were on December 20, 1984.

Weekly stock record (Exhibit III). This record indicates position changes for each week by stock issue and by customer within the issue. For example, on September 21, 1977, Broker X had a long position for customer account 01399701606 of 200 shares of Boeing common stock.

Weekly bond record. These records contain the same information for bond issues as do the weekly stock records.

Customer Statement. A separate account maintained for each customer of a brokerage house indicating the money and security transactions for a period of time, which is mailed to the customer, generally on a quarterly basis.

Overpayment Account Journals. An accounting record in which dividend and interest payments are recorded when they are not paid or credited on the payable date to the broker's customer. These monies remain in the account unless a valid claim is received, with the balance subject to the abandoned property law.

Dividend Position Sheet (Stock Record) (Exhibit IV). The record of individual securities on which both the long and short positions are shown, the total of the long and short positions being in balance.

This position sheet on Houghton Mifflin Co. indicates that Broker X received an overpayment of $1,100 for the payable date of February 22, 1984. The top line identifies the record date, payable date, and dividend rate. The overpayment of $1,100 at 22 cents a share indicates that Broker X sold 5,000 shares of Houghton Mifflin before the record date of February 8, 1984, but received the dividend because the purchaser failed to register the shares in time to be reflected on the books of the corporate paying agent. The prior dividend position sheet, however, did not indicate a movement of shares equivalent to the overpayment, which indicates that Broker X purchased and sold the shares within the same period. After further research, our auditors located the cashier delivery ticket, which showed that the trade was executed on February 3, 1984 (five days before the record date) and the shares were sold to Manufacturers Hanover Trust (MHT) in New York City. Broker X subsequently paid the creditor bank the $1,100 overpayment.

Bond Position Sheet: (Bond Record) Same as stock record.

METHODS OF RECONSTRUCTING OVERPAYMENT TRANSACTIONS

4. There is more than one way to reconstruct the overpayment transactions records in order to determine to whom an overpayment is payable. The most appropriate method may differ slightly from firm to firm, depending on individual variations in record keeping. Under each method, however, use of the overpayment account journals and the weekly stock and bond records and the cashier daily tickets are essential.

5. In general, the most practical way to reconstruct the overpayment transactions would involve four steps. The first step would be to obtain from the overpayment account journal a list of significant overpayments. As stated above, this journal includes the date payment was received, the security issue, the payable date, and the amount.

6. The second step would be to determine the record date and payment rate of the specific issue by using *Standard and Poors Stock and Bond Guides.*

7. Once the record date and payment rate are determined, there are two possible approaches to take in completing the third step.

8. The most practical approach would be to review the position changes for the specific issue, starting with the record date and using the weekly stock or bond record. The reviewer would match a movement of shares which would be equivalent to the overpayment amount between this record and the prior one. Once the match was made, the reviewer would note the date of the transaction (sale) and then locate the cashier daily ticket for that date and issue.

9. The alternative approach would be to compare the bond or dividend position sheet in which the overpayment occurred to the prior position sheet. Since the overpayment usually occurs as the result of a sale, one would look for a reduction in a customer's position matching the overpayment. Once the date

of sale has been obtained from the customer's statement, one would then examine the cashier daily delivery tickets for that issue and date. This approach would be more time consuming and would not reflect a sale if the same shares were purchased after the prior record date.

10. The fourth step would be to examine the cashier daily delivery ticket to determine the address of the broker or bank which purchased the shares and, in all likelihood, is due the overpayment.

11. This process would be possible if all the required records are in order and not misfiled. The practice throughout the industry is not entirely uniform since each broker maintains its records differently (although the above description is typical). The condition of the records is directly related to management concerns, the type of storage used, and the expenses that the firm is willing to incur to preserve the records.

12. The Office of Unclaimed Funds has concluded that reconstruction of these transactions is possible where records are available, but it would be time-consuming and require a large clerical staff under the supervision of one or more auditors. The Office of Unclaimed Funds has estimated that it would take 36 people working full-time for one year to reconstruct the overpayment transactions for any one year of all the brokers which have turned over abandoned property to the Comptroller. Any attempt to reconstruct these transactions should be done in a systematic manner to ensure the most expeditious completion of the project. Thus, the reviewer should trace simultaneously all transactions within a specific overpayment period (one month), since the trades and resulting cashier delivery tickets would probably be within the same time period.

ESTIMATED PERCENTAGE OF CREDITOR BROKERS WHICH HAVE DELAWARE ADDRESSES

13. A far less time-consuming and costly alternative to attempting reconstruction of every overpayment transaction, and one which would be almost as accurate, would be to use representative samples from each debtor broker. This is particularly true

because examinations of representative samples of debtor broker's records by the Office of Unclaimed Funds have disclosed that a significant number of the creditor brokers would have New York addresses while few would have Delaware addresses. For example, one recent limited examination of a representative sample at a typical debtor broker failed to disclose any sales and possible unclaimed overpayments owed to creditor brokers with non-New York addresses. Another examination at one of the few institutional debtor brokers which conducts business predominantly with brokers located out-of-state, indicated upon a test of the records that the amount of overpayments owed to creditor brokers with New York address is still likely to be substantial. At that broker, only .19 percent of the creditor brokers had Delaware addresses.

14. These findings are not surprising since few if any of the participants of the National Securities Clearing Corporation, a group which includes almost all the creditor brokers, have Delaware trading addresses. In addition, eighty-four percent of the top 100 creditor brokers ranked by the Securities Industry Association hold 93.6 percent of the total capital held by all creditor brokers, and have trading addresses located in New York; none have Delaware trading addresses.

RECIPROCITY AGREEMENTS WITH OTHER STATES

15. Last year, New York began entering into prospective reciprocity agreements with other states under section 1417 of the Abandoned Property Law. Idaho, Massachusetts, Minnesota, North Carolina, North Dakota, Virginia, and Wisconsin have already signed such agreements and at least ten other states (not including Delaware) have expressed interest in and are presently considering signing such agreements. Under such agreements, each state agrees that abandoned property in its custody is subject to claims by the true owner at any time, that it will review its annual abandoned property reports to locate property unclaimed by persons or entities whose last known addresses are in the other state, and that it will deliver on an annual basis unclaimed property owed to residents of the other state. A standard reciprocity agreement is attached as Exhibit V. Each of

the states which are parties to the reciprocity agreements deliver unclaimed property owed to individuals and corporations whose last known address (as shown on the debtor's records) is located in the other state.

16. New York is an active member of the Reciprocal Auditing Task Force ("Task Force") of the National Association of Unclaimed Property Administrators ("NAUPA") along with 26 other states (not including Delaware) which cooperate in obtaining unclaimed property abandoned by each other's residents. I am the project coordinator for a major effort by the Task Force to gather information on the abandoned property laws of the participating states. As part of this effort, I sent a questionnaire asking for information about abandoned property statutes to all 49 other states on March 30, 1988. Delaware has not responded to this questionnaire. I have invited all states, including Delaware, at NAUPA conferences to enter into reciprocity agreements with New York. For example, I participated in Task Force panels at NAUPA conferences in 1986 and 1987 and circulated material to all states at the conference. Delaware has failed to respond to these invitations.

/s/ ROBERT GRIFFIN

ROBERT GRIFFIN
Director of Audits
Office of Unclaimed Funds
Office of the Comptroller
of the State of New York

Sworn to before me this
5th day of May, 1988

/s/ STEPHEN MENDELSOHN

NOTARY PUBLIC

EXHIBIT I
(1 of 2)

CASHIER DELIVERY TICKET

BROKER X

: PARTIAL DELIVERY
: DELIVERED
: FAILURE TO DELIVER

Orig. No.	Trade Date	Settlement Date	Date Delivered
	190151	12/19/84	12/19/84

Ident. No.	Account Name	CH. No.	Special Delivery Instructions
		0370	Asiel & Company 20 Broad Street New York, New York 10005

WE	QUANTITY	CUSIP NO.	SECURITY DESCRIPTION	SYMBOL
DEL	500	556139-10-3	MACY	21,500.00

EXHIBIT I
(2 of 2)

CASHIER DELIVERY TICKET

BROKER X

: PARTIAL DELIVERY
: DELIVERED
: FAILURE TO DELIVER

Orig. No.	Trade Date	Settlement Date	Date Delivered
	9999999	XX/XX/XX	XX/XX/XX

Ident. No.	Account Name	CH. No.	Special Delivery Instructions
370		370	

WE	QUANTITY	CUSIP NO.	SECURITY DESCRIPTION	SYMBOL
SLD	1800	370-442-402	GM PFD E	

NET AMOUNT

70,200

EXHIBIT II

BROKER X

: PARTIAL DELIVERY
: DELIVERED
: FAILURE TO DELIVER

Orig. No.	Trade Date	Settlement Date	Date Delivered
:____:	200130	12/20/84	12/20/84

Ident. No.	Account Name	CH. No.	Special Delivery Instructions
:____:		0211	BEAUCHAMP & CO.
:____:			50 Broad Street
			New York, New York 10005

WE	QUANTITY	CUSIP NO.	SECURITY DESCRIPTION	SYMBOL
BOT	8,100	027627-10-8	AMER MOTORS	

NET AMOUNT

32,400.00

EXHIBIT III

WEEKLY STOCK RECORD

BROKER X

Date	Account 1B	Position Long	Position Short	Segregation	Safekeeping	Transfer	Date	Account 1B	Position Long	Position Short	Segregation	Safekeeping	Transfer
07/32/6	BOEING COMPANY									NYSE CCS	0972	023-10-52	BA
09/21/77	01399701606	1200		1200		I	09/26/77	02941311606	1000		500	500	
09/21/77	01605002039	400				I	09/21/77	03134351031	200		200	200	I
09/21/77	01659082126	200		200			02/03/78	03291541070	300		300		I
09/21/77	01709852152	400		400			09/21/77	03351911046	448		448		
09/21/77	01818002039	200				I	02/23/78	03648982121	100				
09/21/77	01821492220	200					02/21/78	65028463452		300			
09/21/77	01827701606	1000		1000		I	02/02/78	97001040		500			
02/17/88	01839602011	200		181		I	02/23/78	97981010		9074			
10/11/77	01872131022	100		100			09/21/77	98982210		2800			
01/30/78	01993471221	100		100			09/20/77	98982910		1000			
09/21/77	02184802038	100		100			02/22/78	98984110		2300			
11/23/77	02757412055	500											

Broker X

BD200D — SECURITIES PAID

		RCD DATE	PAY DATE	DIV RATE
441560-10-9	HOUGHTON MIFFLIN CO.	02-08-84	02-22-85	.220000

		NET POSITION		STOCK DIV.		CASH DIV.			
SHORT NAME	ACCOUNT	LONG	SHORT	LONG	SHORT	DEBIT	CREDIT	TYP TAX	MESSAGE
O'CONNOR HE	065-002537-1	300					66.00		Gross Div
							66.00**	Div.	Net Div
O'CONNOR HE	065-002545-1	300					66.00		Gross Div
							66.00**	Div.	Net Div
	960-102004-1		600			132.00			Gross Div
TOTALS		600	600			132.00	132.00		GROSS DIVIDEND TOTALS
									NRA TAX TOTAL
									TEFRA TAX TOTAL
						132.00	132.00		NET DIVIDEND TOTALS

3/7

COMPANY CHECK
CREDIT THRU DTC
132.00 2/22
CREDIT A/C CHARGE
BROKERS CHECKS
W/O

Dr Siac 1,100.00
Div Adj

EXHIBIT IV
(Page 2 of 2)

BROKER X

: PARTIAL DELIVERY
: DELIVERED
: FAILURE TO DELIVER

Orig. No.	Account No.	Trade Date	Settlement Date	Date Delivered
:____:	065-002081-0 451	2/03/84	02/10/84	2/10

Ident. No.	Account Name	CH. No.	Special Delivery Instructions
:____:	Manufacturers Hanover Tr. Co.		DTC # 930
:____:	600 Fifth Avenue		Manufacturers Hanover Trust
	New York, New York 10020		Order Room Trades
	Att: Order RM 6th Fl.		Courtesy 14 Research Corp.

WE	QUANTITY	CUSIP NO.	SECURITY DESCRIPTION	SYMBOL
SLD	5,000	441560-10-9	Houghton Mifflin Co.	HTN

ecord Date 02-08-84
. Date 02-02-84
TC

PRICE	PRINCIPAL	COMMISSION	NET AMOUNT
24,848	124,240.00	650.00	124,890.00

BEST AVAILABLE COPY

EXHIBIT V

Unclaimed Property Reciprocal Agreement

The State of _____ and the State of New York have entered into this Reciprocal Agreement this ____ day of _____ 1987.

WHEREAS, the _____ of the State of _____ may hold certain unclaimed property credited to the names of the persons or entities apparently entitled to such property whose last known addresses were in the State of New York, and

WHEREAS, the Comptroller of the State of New York may hold certain unclaimed property credited to the names of the persons or entities apparently entitled to such property whose last known addresses were in the State of _____, and

WHEREAS, the _____ and the Comptroller of said jurisdiction are desirous of ensuring that said property is returned to the lawful owners thereof, and

WHEREAS, the Supreme Court of the United States has ruled that the state of the apparent owner's last known address has a priority claim to escheat abandoned unclaimed property, and

WHEREAS, the States of _____ and New York, in the interests of comity and reciprocity, are desirous of encouraging holders of unclaimed money to report and deliver such property so that their respective residents will receive their lost or forgotten property, and

WHEREAS, the laws of the State of New York and the State of _____ provide that such property be held in custody subject to claim by the person or persons entitled thereto at any time without limitation thereto,

NOW, therefore, the _____ of the State of _____ and the Comptroller of the State of New York hereby agree as follows:

1. Each state shall review its records for reports filed on or after April 1, 198 to ascertain the name, address and amount of unclaimed money of $25.00 or more credited to apparently entitled persons whose last known addresses are located within the other state.

2. From and after the date of this agreement, the parties agree to maintain a record of all unclaimed money coming into their possession, the apparent owners of which have a last known address in other state.

3. The State of _____ and New York hereby agree to deliver on an annual basis to each other the unclaimed money owing to their respective residents.

4. Only such property of a type which is subject to the unclaimed property laws of the receiving state shall be delivered to such state pursuant to paragraph 3. Property which can be identified from the records of the delivering state as being specifically excluded from the unclaimed property laws of the receiving state shall not be delivered to, or receivable by, such state pursuant to this agreement.

5. The State of _____ and the State of New York, to the extent provided by existing law, relieve and hold harmless the other for any liability for any claims or damages which exist or may exist with respect to the delivery of such unclaimed property to each other.

Such relief shall, to the extent provided by existing law, run solely from the state receiving property pursuant to this agreement to the state delivering such property pursuant to this agreement, and shall not run to those holders of unclaimed property which initially delivered such property to either state. Holders delivering such property to either state shall be entitled only such relief for such delivery as provided by the laws of the state initially receiving said property from such holders.

6. The State of _____ and New York as a matter of comity and reciprocity hereby agree to the extent permitted by law to exchange audit information and holder reporting

information which will assist the other in enforcing its unclaimed property law and further agrees to advise and encourage the holders of unclaimed money to report and deliver such property to the other state pursuant to its law.

7. For the mutual benefit of their residents, _____ and New York may agree to participate and cooperate in joint and/or reciprocal examinations of noncomplying property holders on such terms and conditions as may be subsequently agreed upon.

8. The State of _____ and the State of New York hereby agree, to the extent authorized by law, to execute any further or additional documents which may be required to implement this agreement.

9. The terms and conditions of the Reciprocal Agreement shall become effective on _____, upon approval as to form by the Attorney General of the State of _____ and the State of New York.

10. Either state, upon ninety day's notice in writing to the other, may terminate this agreement, without prejudice to subsequent renewal upon agreement by both states.

STATE OF NEW YORK	STATE OF
BY: _____	BY: _____
DATE: _____	DATE: _____
APPROVED AS TO FORM:	APPROVED AS TO FORM:
ATTORNEY GENERAL, STATE OF NEW YORK	ATTORNEY GENERAL, STATE OF
_____	_____ Special Assistant Attorney General

EXHIBIT B

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

STATE OF NEW YORK)
: SS.:
COUNTY OF ALBANY :

AFFIDAVIT OF HERBERT M. FRIEDMAN

I, HERBERT M. FRIEDMAN, upon personal knowledge hereby depose and say, under penalties of perjury:

1. I am Assistant Deputy Counsel, Division of Legal Services, Office of the New York State Comptroller, having been appointed to such position in December, 1985. From September, 1976 until January, 1984, I was Associate Counsel, Bureau of Abandoned Property, Office of the New York State Comptroller. During such period, I supervised the receipt, examination and payment of all claims for the refund and/or return of unclaimed funds held by the State of New York under the New York Abandoned Property Law and related statutes. Since January 1984, I have acted as legal consultant to the Office of Unclaimed Funds, Office of the New York State Comptroller.

2. Other states have presented claims for abandoned property directly to the Comptroller under section 1406(1) of the New York Abandoned Property Law, in the same manner as claims presented by private persons. In recent years, for example, Alaska, Maine, Massachusetts, North Carolina, Texas, Utah and Virginia have all made such claims. In the only case in which New York denied a claim, the claimant state did not seek further administrative or judicial review. Delaware has never made a claim for abandoned property under this section.

/s/ HERBERT M. FRIEDMAN

HERBERT M. FRIEDMAN
ASSISTANT DEPUTY COUNSEL
DIVISION OF LEGAL SERVICES
OFFICE OF THE COMPTROLLER
OF THE STATE OF NEW YORK

Sworn to before me this
29 day of April, 1988

/s/ PAUL V. MORGAN

NOTARY PUBLIC

No. 111 Original

IN THE SUPREME COURT OF
THE UNITED STATES

October Term, 1987

STATE OF DELAWARE,
Plaintiff

v.

STATE OF NEW YORK,
Defendant

On Motion For Leave To
File Complaint

Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

BRIEF OF STATES OF PENNSYLVANIA, FLORIDA, RHODE ISLAND, NEW JERSEY, ARIZONA, UTAH AND ARKANSAS

AS AMICI CURIAE IN
SUPPORT OF THE PLAINTIFF

LeROY S. ZIMMERMAN
Attorney General

BY: JANICE L. ANDERSON
Deputy Attorney General
Counsel of Record

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Attorneys for Amici Curiae

Office of Attorney General
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1471

DATED: May 9, 1988
(Additional Counsel listed Inside)

16 pp

Hon. Robert K. Corbin
Attorney General of Arizona
1275 West Washington Street
Phoeniz, Arizona 85007

Hon. W. Carey Edwards
Attorney General of New Jersey
Richard J. Hughes Justice Complex
CN 112
Trenton, New Jersey 08625

Hon. James E. O'Neil
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903

Hon. Gerald A. Lewis
Comptroller of Florida
The Capitol
Tallahassee, FA 32301

Hon. David L. Wilkinson
Attorney General of Utah
236 State Capital
Salt Lake City, Utah 84114

Hon. Steven Clark
Attorney General of Arkansas
201 East Markham Street
Heritage West Building
Little Rock, AR 72201

QUESTIONS PRESENTED

1. Whether the Court should exercise original jurisdiction over the complaint filed by Delaware against New York involving escheat of unclaimed intangible property held in New York by firms incorporated in Delaware?

2. Whether New York may disregard the holding in Texas v. New Jersey, 379 U.S. 674 (1974), in order to escheat unclaimed intangible property held by firms doing business in New York but incorporated in Delaware?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
INTEREST OF THE AMICI STATES	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. THE COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER A CONTROVERSY BETWEEN TWO STATES CLAIMING THE RIGHT TO ESCHEAT THE SAME INTANGIBLE PROPERTY	6
II. NEW YORK SHOULD BE RESTRAINED FROM ESCHEATING UNCLAIMED INTANGIBLE PROPERTY WHICH PROPERLY REVERTS TO DELAWARE UNDER THE RULES OF PRIORITY ESTABLISHED IN TEXAS V. NEW JERSEY, 379 U.S. 674 (1965), and PENNSYLVANIA V. NEW YORK 407 U.S. 206 (1972)	8
CONCLUSION	11

TABLE OF AUTHORITIES

Cases	Page
Pennsylvania v. New York, 407 U.S. 206 (1972)	2, 4, 6, 8
Texas v. New Jersey, 379 U.S. 674 (1965)	passim
Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961)	6, 9

CONSTITUTION

Constitution Of The United States Article III, Section 2	4

STATUTORY PROVISION

United States, Title 28, § 1251(a)	4, 6

Interest of Amici States

Many brokerage firms do business in New York but are incorporated elsewhere. Each year millions of dollars in dividends and interest remain unpaid because these brokerage firms are unable to trace the beneficial owners. New York, which has a three-year escheat law, escheats this unclaimed intangible property from both brokerage firms incorporated in New York and those incorporated in other states. Delaware, which has a seven-year escheat law, complains that as to firms incorporated in Delaware, New York is escheating property which by right ought to go (eventually) to Delaware.

The amici States all have escheat statutes similar to Delaware's. The amici States support Delaware's position that, under Texas v. New Jersey, 379

U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972), New York is not entitled to escheat unclaimed intangible property held by brokers conducting business in New York but incorporated elsewhere. Amici States have a significant interest in this matter because they rely upon the rules of priority established by the Court to govern situations in which laws of two or more states permit escheat of the same intangible property. Adherence to these equitable standards enables amici States to avoid litigation resulting from inconsistent claims to the same property. The relief sought by Delaware is compatible with the rules followed by amici States.

Amici believe that New York's actions are an unjustified departure from this Court's well-established principles of priority among states with

competing escheat interests, which will create substantial practical problems for the States, not the least of which will be an unseemly competition to establish the shortest possible escheat period. For this reason, amici urge this Court to accept jurisdiction over this matter, permit the filing of Delaware's complaint and affirm the salutary ruling of Texas v. New Jersey, 379 U.S. 674 (1965).

SUMMARY OF ARGUMENT

1. A controversy between two states claiming entitlement to escheat the same intangible property is properly resolved by the exercise of this Court's original and exclusive jurisdiction under Article III, Section 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code.

2. This Court established rules of priority to govern situations in which the laws of two or more states permit escheat of the same unclaimed intangible property. In Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972), the Court prescribed easily administered, equitable guidelines to determine which state was entitled to escheat abandoned intangible property.

The Court determined that the state with priority over intangible property was the state in which the holder's records placed the beneficial owner. If no record is available, or if the state with priority had no escheat law, then the state of the holder's incorporation was entitled to escheat the property. In this matter, Delaware seeks to prohibit New York from countermanding this standard by escheating unclaimed intangible property held by firms conducting business in New York but incorporated in Delaware.

ARGUMENT

I. THE COURT HAS ORIGINAL AND EXCLUSIVE JURISDICTION OVER A CONTROVERSY BETWEEN TWO STATES CLAIMING THE RIGHT TO ESCHEAT THE SAME INTANGIBLE PROPERTY.

Both New York and Delaware claim the right to escheat unclaimed intangible property held by firms incorporated in Delaware and doing business in New York. The amici States concur with Delaware that, pursuant to 28 U.S.C. §1251(a), this Court is the appropriate forum for resolution of this controversy between the two states.

The similarity between this matter and cases previously heard by the Court in its original jurisdiction is apparent. See Pennsylvania v. New York, 407 U.S. 206 (1972); Texas v. New Jersey, 379 U.S. 674 (1965). In Western Union Telegraph Co. v. Pennsylvania, 368 U.S.

71 (1961), the Court noted that a state court judgment of escheat cannot protect the holder from an escheat claim of another state, and directed states with conflicting escheat claims to seek settlement of their controversies by invoking the Court's original and exclusive jurisdiction. Delaware's complaint requests precisely such a settlement and, therefore, amici believe it is imperative that this Court grant Delaware's motion for leave to file its complaint against New York.

II. NEW YORK SHOULD BE RESTRAINED FROM ESCHEATING UNCLAIMED INTANGIBLE PROPERTY WHICH PROPERLY REVERTS TO DELAWARE UNDER THE RULES OF PRIORITY ESTABLISHED IN TEXAS V. NEW JERSEY, 379 U.S. 674 (1965), and PENNSYLVANIA V. NEW YORK, 407 U.S. 206 (1972).

Delaware maintains that New York is attempting to escheat unclaimed intangible property held by brokerage firms conducting business in New York but incorporated in Delaware. New York's action disregards the holdings of Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972), governing situations in which the laws of two or more states permit escheat of the same intangible property. Those cases hold that the state with priority over intangible property is the state in which the holder's records place the beneficial

owner. If the holder's records do not contain this information, or if the beneficial owner's state has no provision for escheat of intangible property, then the intangible property reverts to the holder's state of incorporation.

The system established by these cases has proven to be both equitable and easy to administer. It enables states with inconsistent claims to the same escheatable property to avoid the time and expense of filing and attempting to perfect their claims. It virtually eliminates the burden that such competing claims placed upon holders of such property. Finally, it obviates the due process problems which can result from competing claims to the same intangible property (see Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961)).

Amici States believe that the practical benefits resulting from the rules established by the Court underscore the continuing vitality of those rules. These benefits will be eliminated if states can disregard the rules of priority in order to benefit their individual fiscal requirements. If New York can disregard this Court's holdings, so can other states. The results will be an unseemly scramble among the states to establish priority over escheated property by the simple expedient of being the first to grab it, and an unhealthy uncertainty among the holders of such property. The amici States therefore urge the Court to grant Delaware's motion and to affirm the salutary holding of Texas v. New Jersey.

CONCLUSION

For the foregoing reasons, the amici States urge the Court to accept jurisdiction over this matter, permit filing of the complaint by the State of Delaware and affirm Texas v. New Jersey, 379 U.S. 674 (1965).

Respectfully submitted,

LeROY S. ZIMMERMAN
Attorney General

By: Janice L. Anderson
JANICE L. ANDERSON
Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Litigation Section

Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120
(717) 783-1471

Date: May 9, 1988

Supreme Court, U.S.
FILED
MAY 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-111, Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

—v.—

STATE OF NEW YORK,

Defendant.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER'S MOTION FOR LEAVE TO FILE COMPLAINT

JUDITH WELCOM
Counsel of Record
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for
SECURITIES INDUSTRY ASSOCIATION, INC.
BEAR, STEARNS & CO. INC.
DOMINICK & DOMINICK, INCORPORATED
DREXEL BURNHAM LAMBERT INCORPORATED
PAINEWEBBER INCORPORATED
SHEARSON LEHMAN HUTTON INC.

AS AMICI CURIAE

TABLE OF CONTENTS

PAGE

Table of Authorities ii

Brief *Amici Curiae* 1

Interest of *Amici Curiae* 2

Reasons for Granting Leave to File Complaint 3

Conclusion 5

TABLE OF AUTHORITIES

Cases: PAGE

Nevada v. *Hall*, 440 U.S. 410 (1979) 3

Pennsylvania v. *New York*, 407 U.S. 206 (1972) .....*passim*

Texas v. *New Jersey*, 379 U.S. 674 (1965) .....*passim*

Western Union Telegraph Co. v. *Pennsylvania*, 368 U.S. 71 (1961) 4

Statutes:

Delaware Escheat Law, Del. Code Ann. tit. 12, §§ 1197-1211 (1987).....*passim*

New York Abandoned Property Law, N.Y. Aband. Prop. Law, art. V-A (McKinney Supp. 1988).....*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

—v.—

STATE OF NEW YORK,

Defendant.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF THE PETITIONER'S MOTION FOR LEAVE TO FILE COMPLAINT

The Securities Industry Association, Inc. ("SIA"), Bear, Stearns & Co. Inc. ("Bear Stearns"), Dominick & Dominick, Incorporated ("Dominick"), Drexel Burnham Lambert Incorporated ("Drexel"), PaineWebber Incorporated ("PaineWebber") and Shearson Lehman Hutton Inc. ("Shearson") submit this brief as *amici curiae* in support of the motion of the State of Delaware for leave to file its Complaint against the State of New York. Pursuant to Rule 36.1 of the Rules of this Court, the written consent of plaintiff the State of Delaware and defendant the State of New York has been obtained and has been filed with the Clerk of the Court.

INTEREST OF *AMICI CURIAE*

SIA is the principal trade association of the securities industry, having as its members hundreds of securities firms, including *amici curiae* Bear Stearns, Dominick, Drexel, PaineWebber and Shearson. Many of SIA's members are incorporated under the laws of the State of Delaware, but maintain their principal places of business in New York City ("Delaware Brokers"). Delaware Brokers frequently hold monies and other intangible property for which they cannot identify a beneficial owner, much less a last known address for the owner. Over the years, the State of New York has routinely compelled delivery of this property by Delaware Brokers under Article V-A of the New York Abandoned Property Law, N.Y. Aband. Prop. Law, art. V-A (McKinney Supp. 1988), notwithstanding this Court's prior decisions granting to the state of the holder's incorporation (here, Delaware) the right to escheat abandoned property for which there is no last known address.

Amici curiae have a substantial interest in the resolution of this controversy between Delaware and New York. New York's prior enforcement of its expansive escheat policy has led to New York's assertion of claims against Delaware Brokers for the very property that is in issue in this action. A number of brokerage firms have also been the subject of lengthy audits by New York's auditors with respect to the same property. The Delaware Brokers' failure to acquiesce in New York's position has led to threats of litigation, and, in the case of PaineWebber, a seven-year administrative proceeding. Thus, a decision by this Court on the issues raised by the Complaint will have a substantial and immediate impact on the *amici*, not only with respect to their future reporting obligations but also with respect to claims by New York and Delaware that are pending against them.

REASONS FOR GRANTING LEAVE TO FILE COMPLAINT

Recognizing the need for simple rules of general application, this Court, in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), established that where the last known address of an owner of abandoned property can be determined, the state of that address has the right and power to escheat the property. Where no such address can be determined, the state of incorporation of the holder—here the brokerage firm—has the right to escheat the property. Pursuant to these rules, the State of New York annually escheats millions of dollars of property owed to persons having last known addresses in New York and from holders incorporated under New York law. In addition, however, New York has derived substantial revenues from escheating property from the Delaware Brokers where no last known address for an owner of the property can be determined. Because the New York Abandoned Property Law provides for escheat after only three years, while the Delaware Escheat Law, Del. Code Ann. tit. 12, §§ 1197-1211 (1987), provides for escheat after seven years, New York has demanded and often received abandoned property held by the Delaware Brokers prior to the time when Delaware could make any claim to it.

This Court's reaffirmation of the applicability of its prior decisions is necessary to avoid the Delaware Brokers' being subjected to multiple claims to the same property. The New York Abandoned Property Law purports to protect holders of property from conflicting claims to the same property by providing that "[n]o action shall be maintained" against the holder to recover property previously turned over to New York. N.Y. Aband. Prop. Law § 1404(3). The New York statute, however, is not binding upon subsequent out-of-state claimants who assert ownership of the property escheated by New York, including claimant states such as Delaware. *See Nevada* v. *Hall*, 440 U.S. 410, 421-23 (1979) (under the Full Faith and Credit Clause of the United States Constitution, one state need not apply another state's statute if that statute conflicts with the laws of the

forum state). The New York law also provides that the Comptroller may, within six years after property is delivered to New York, refund the property to the holder *if* "it appears to the satisfaction of the state comptroller" that the property was turned over by mistake. N.Y. Aband. Prop. Law § 1404(4). It seems unlikely, if Delaware were to assert a subsequent claim to property escheated by New York, that the New York Comptroller would decide that New York had acquired the property in error.

In *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71, 79 (1961), this Court expressly recognized the problem of conflicts among the escheat laws of different states. The Court held that litigation between claimant states in the original jurisdiction of this Court was the only solution adequate to protect holders of property from multiple claims. 368 U.S. at 75. *Amici* submit that this Court should exercise its jurisdiction in this action to reaffirm the rules of *Texas* v. *New Jersey* and *Pennsylvania* v. *New York*. The wisdom of the rules' simplicity is underscored by this controversy, which involves not a dispute over their interpretation, but, rather, a refusal by New York to honor their plain import. Absent this Court's intervention, the Delaware Brokers will continue to be subjected to the demands of conflicting rules of law: the pronouncements of this Court, on the one hand, and the ever-expanding scope of the New York Abandoned Property Law, on the other.

CONCLUSION

For the foregoing reasons, the motion of the State of Delaware for leave to file the Complaint should be granted.

Dated: May 9, 1988

Respectfully submitted,

Judith Welcom
Counsel of Record
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Amici Curiae

Of Counsel:

William J. Fitzpatrick, Esq.
Gerard J. Quinn, Esq.
Virginia Grande, Esq.
SECURITIES INDUSTRY ASSOCIATION, INC.

Mark E. Lehman, Esq.
BEAR, STEARNS & CO. INC.

Robert C. Harrison, Esq.
DOMINICK & DOMINICK, INCORPORATED

Burton M Fendelman, Esq.
DREXEL BURNHAM LAMBERT INCORPORATED

John A. Borgese, Esq.
PAINEWEBBER INCORPORATED

Robert C. Dinerstein, Esq.
SHEARSON LEHMAN HUTTON INC.

Supreme Court, U.S.
FILED
MAY 19 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

Charles M. Oberly, III
Attorney General of Delaware
Fred S. Silverman
Chief Deputy Attorney General
J. Patrick Hurley, Jr.
Assistant Attorney General
Richard L. Sutton, Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Plaintiff
The State of Delaware

May 19, 1988

SMITH EDWARDS DUNLAP COMPANY, 2967 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
I. THIS COURT SHOULD TAKE JURISDICTION OF THIS DISPUTE IN ORDER TO PREVENT NEW YORK FROM DEPRIVING DELAWARE OF ITS RIGHTS AS ESTABLISHED BY THIS COURT IN TEXAS v. NEW JERSEY AND PENNSYLVANIA v. NEW YORK	1
A. New York Has Taken The Intangible Personal Property At Issue Here As Property Of Unknowns	2
B. The Securities Industry From Which New York Has Seized The Intangible Personal Property At Issue Here Has Surrendered It As Property Of Unknowns	3
C. New York's Argument Contravenes *Texas v. New Jersey* And *Pennsylvania v. New York*	4
II. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WARRANTING THE EXERCISE OF THIS COURT'S ORIGINAL AND EXCLUSIVE JURISDICTION	7
CONCLUSION	9
EXHIBIT—NEW YORK'S "PRELIMINARY STATEMENT OF POSITION" IN THE PAINEWEBBER PROCEEDING	A1-5
PROOF OF SERVICE	A-6

TABLE OF AUTHORITIES

CASES:	Page
Maryland v. Louisiana, 451 U.S. 725 (1981)	8
Ohio v. Wyandotte Chemical Corp., 401 U.S. 493 (1971)	8
Pennsylvania v. New York, 407 U.S. 206 (1972)	passim
Texas v. New Jersey, 379 U.S. 674 (1965)	passim
Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961)	9
STATUTES:	
New York Abandoned Property Law § 513-a	4
New York Abandoned Property Law § 1406(1)	7, 8
New York Abandoned Property Law §§ 1405-1407	8
OTHER AUTHORITIES:	
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th Ed. 1986)	9

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PLAINTIFF'S REPLY BRIEF IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE COMPLAINT

ARGUMENT

I. THIS COURT SHOULD TAKE JURISDICTION OF THIS DISPUTE IN ORDER TO PREVENT NEW YORK FROM DEPRIVING DELAWARE OF ITS RIGHTS AS ESTABLISHED BY THIS COURT IN TEXAS V. NEW JERSEY AND PENNSYLVANIA V. NEW YORK.

New York argues that this Court should not take this case because it is based upon "a profound misunderstanding of the facts," *i.e.*, New York is not escheating intangible personal property of unknowns as Delaware claims; rather New York is escheating the property of "creditor brokers" having their trading addresses in New York (NY Br. 1). That argument is inconsistent with the position of New York in taking the property; it is inconsistent with the position of the securities industry from whom New York has taken the property; and it contravenes the express holdings of *Texas v. New Jersey*, 379

U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), to which New York gives lip service but no substantive obedience.

A. New York Has Taken The Intangible Personal Property At Issue Here As Property Of Unknowns.

New York cannot deny that, contrary to *Texas v. New Jersey* and *Pennsylvania v. New York*, it has routinely purported to compel the escheat to New York of intangible personal property belonging to unknown owners and has directed the Delaware Brokerage Corporations[1] to pay over to it such property. Thus, the 1983 edition of New York's "Abandoned Property Law Handbook for Brokers and Dealers,"[2] expressly directed payment to New York of intangible property where "the persons or customers entitled to such payment cannot be identified (unknown)" (Exhibit C, p. 71). The 1988 edition of New York's "Handbook for Reporters of Unclaimed Funds," which New York has lodged with the Clerk (NY Br. 10 n. 10), also directs the brokers to pay to New York "amounts . . . held . . . for unknown parties or addressee unknown . . . whether or not the broker is incorporated in New York" (p. 40).

In its seven-year-old administrative proceeding against PaineWebber Incorporated, involving part of the intangible personal property at issue here, New York has admitted (A3-4):

> Generally, such dividends and securities, when received and held by a brokerage house in its "street name", and not readily attributable to customer accounts, are held for "unknown" owners.
>
> * * *
>
> In this matter, . . . not only the addresses of the creditors, but their identities as well are unknown . . .

---

1. Corporations incorporated under the laws of Delaware as defined in Delaware's opening brief, p. 17.

2. Excerpts of which were attached to Delaware's opening brief, pp. 64-75.

Further, New York has admitted in the PaineWebber proceeding that, but for New York's shorter escheat statute, Delaware, as the state of incorporation of PaineWebber, would be entitled to escheat the property at issue there as property of unknowns (A4-5). To Delaware's knowledge, New York has not advanced in the lengthy PaineWebber proceeding the contention it advances here, apparently for the first time, that the property it has been taking for seventeen years as property of unknowns, is not really such.

B. The Securities Industry From Which New York Has Seized The Intangible Personal Property At Issue Here Has Surrendered It As Property Of Unknowns.

The Securities Industry Association, Inc. ("SIA"), the principal trade association of the securities industry which has hundreds of members including Delaware Brokerage Corporations, many of which have their trading addresses in New York (SIA Br. 2), has filed an *amicus* brief herein. In urging that this Court take this case, the SIA confirms that the intangible personal property in issue here has been demanded and taken by New York for years as the property of unknowns (SIA Br. 2-3):

> Delaware Brokers frequently hold monies and other intangible property for which they cannot identify a beneficial owner, much less a last known address for the owner. Over the years, the State of New York has routinely compelled delivery of this property by Delaware Brokers under Article V-A of the New York Abandoned Property Law . . .
>
> * * *
>
> . . . New York's prior enforcement of its expansive escheat policy has led to New York's assertion of claims against Delaware Brokers for the very property that is in issue in this action.
>
> * * *
>
> . . . New York has derived substantial revenues from es-

cheating property from the Delaware Brokers where no last known address for an owner of the property can be determined.

C. New York's Argument Contravenes *Texas v. New Jersey* And *Pennsylvania v. New York.*

Under *Texas v. New Jersey* and *Pennsylvania v. New York*, in order for New York to be able to escheat the abandoned property in question from debtor Delaware Brokerage Corporations, it must be "the State of the last known address of the creditor, *as shown by the debtor's books and records.*" *Texas v. New Jersey*, 379 U.S. at 682 (emphasis added); *Pennsylvania v. New York*, 407 U.S. at 210. New York undertakes to explain away its having expressly demanded and received property of unknowns by asserting that its illegal behavior was of no practical significance[3] because the books and records of the Delaware Brokerage Corporations either do really show or could be made to show that the abandoned property at issue here belonged to creditor brokers having trading addresses in New York (NY Br. 1, 3-4, 7).

Any contention that the records of the Delaware Brokerage Corporations show creditor brokers having their trading addresses in New York as the owners of the property is incredible on its face. If the records did show that, the property would have been paid over to the creditor brokers, as New York must admit (NY Br. A-3 ¶3).[4]

---

3. In fact, New York claims an advantage from its illegal procedures. Under *Texas v. New Jersey*, the state of incorporation of the debtor escheats and holds the abandoned property of unknowns until another state can prove a superior right. 379 U.S. at 682. Thus, in this case, had Delaware taken the property of unknowns, New York would have had the burden of proving that the owner of such property had a New York address. New York claims that Delaware now has the burden of proving that the property is not that of a New York addressee (NY Br. 3, 30), even though New York took the property as that of unknowns.

4. In any event, under Section 513-a of the New York Abandoned Property Law, the brokers are required to retain their records for only eight years (NY Br. 10). Accordingly, for the period 1971 to 1980, Delaware is entitled to judgment that the property seized by New York is from unknowns and, accordingly, may be escheated only by Delaware.

As the SIA states in its *amicus* brief, the Delaware Brokerage Corporations have already been subjected to "lengthy" audits by New York with respect to the property in issue (SIA Br. 2). New York's brief confirms that (NY Br. A-1, A-3, ¶¶ 1 and 3). In short, what is left, out of the billions of dollars of transactions conducted by the securities industry each year, are relatively small amounts of funds—still amounting to millions of dollars—for which there is no practical way to determine the owners from the books and records of the Delaware Brokerage Corporations. Surely, had there been any practical way to maintain or reference such records, the sophisticated, financially-motivated Delaware Brokerage Corporations would have done so to their own collective gain rather than abandoning the property and surrendering it to New York. Indeed, New York concedes that it is "not practicable" to reconstruct most overpayment transactions (NY Br. 13).[5]

What New York's argument really comes down to is that such records could now be created either without regard to practical considerations of time and expense or based upon certain assumptions or presumptions concerning the alleged facts, such as the manner in which the securities industry conducts its business and satisfies customers' claims, and statistical probabilities based upon trading activities.[6]

But any such contention by New York flies in the face of

---

5. If New York (or any other state) wishes records to be kept in a certain way, it is free to compel the keeping of such records, as this Court has recognized. *Pennsylvania v. New York*, 407 U.S. at 215. Absent such legislation, however, New York is not entitled, under *Pennsylvania v. New York* and *Texas v. New Jersey*, to take property shown by the records of the debtors as the property of unknowns, on the theoretical basis that if perfect records had been or could be kept they would show that the creditors were located in New York.

6. For example, New York assumes that the customers of the creditor brokers "should have been fully satisfied in the ordinary course of business" (NY Br. 13), that "the names and addresses of the creditor brokers appear on the debtor brokers' records" (NY Br. 8), and that the "trading addresses" of the creditor brokers are the relevant addresses (NY Br. 7). Delaware denies that such records, if they existed, would show what New York contends. In short, Delaware disputes New York's contention that "it would be possible to reconstruct most of the transactions . . ." (NY Br. 8).

the bedrock principle established in *Texas v. New Jersey* and reaffirmed in *Pennsylvania v. New York* that disputes between states concerning escheat matters must be resolved by a rule which (1) will cover all disputes between the states with respect to all intangible personal property and (2) will be easy to administer. The whole point is to eliminate the need for litigation between the states by taking away the fertile breeding ground for controversy of distinction and complicated factfinding.

Accordingly, in *Texas v. New Jersey*, this Court rejected any notion of looking beyond a debtor's own books and records for an address of the creditor, stating at 379 U.S. 681 n. 11:

> . . . [S]ince ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last-known address.

And, in *Pennsylvania v. New York*, this Court rejected Pennsylvania's argument that since abandoned Western Union money orders were purchased in Pennsylvania, it was reasonable to presume that most were purchased by Pennsylvanians and should be escheated there, in the absence of an address of some other state on the records of Western Union. Ruling that New York, as the state of incorporation, could escheat such property as that of unknowns, this Court noted at 407 U.S. 215:

> [T]o vary the application of the Texas rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided—that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to the everdeveloping new categories of facts."

New York, of course, urged this Court to that holding from which it benefitted. Now, when its financial interest runs the other way, its newly crafted argument calls on this Court to reverse the above holdings and to conclude that

because the debtors' records are not adequate to determine the true creditors, disputes between states involving the escheat of intangible personal property from brokerage houses should be resolved not as other escheat disputes are resolved—on the basis of the records as kept by the debtor—but on the basis of constructive records turning upon presumptions, assumptions or the particular facts of the conduct of transactions by brokerage houses.[7] Under *Texas v. New Jersey* and *Pennsylvania v. New York*, no case-by-case factual determination is called for or permitted. Delaware asks this Court to confirm that its prior decisions mean what they say and to direct New York to obey them.

In sum, New York's brief in opposition to Delaware's motion for leave to file its complaint is an elaborate straw man constructed in an effort to persuade this Court that the dispute between New York and Delaware is a simple factual misunderstanding which could readily be resolved by discussion or fact-finding, rather than what it truly is—a fundamental dispute between two states as to the applicability of the teachings of *Texas v. New Jersey* and *Pennsylvania v. New York* to the escheat of property from the Delaware Brokerage Corporations. This Court should take this case and resolve that dispute.

II. THE COMPLAINT PRESENTS A JUSTICIABLE CONTROVERSY WARRANTING THE EXERCISE OF THIS COURT'S ORIGINAL AND EXCLUSIVE JURISDICTION.

Having acquired the intangible personal property in issue on the basis that it was the property of unknowns, which is property only Delaware can escheat, it comes with ill grace for New York to argue that Delaware is not now entitled to ask

---

7. If New York's hypothetical records were to govern, there would no longer be any abandoned property since, according to New York (which Delaware denies), such records would show the owner of the property to be a creditor broker in New York which undoubtedly would claim and be entitled to the property (New York Abandoned Property Law §1406(1), NY Br. 10-11).

this Court to exercise its original jurisdiction. New York contends that Delaware should be content to pursue a remedy against New York in its own backyard, including an administrative proceeding before the New York State Comptroller,[8] who has already determined that New York is properly escheating the property in issue. In that proceeding, according to New York, Delaware would have the burden of proving the absence of New York address records, even though New York took the property as property of unknowns.[9]

Not surprisingly, New York's position runs counter to a fundamental principle underlying Supreme Court original jurisdiction over disputes involving states, as set forth by this Court in *Ohio v. Wyandotte Chemical Corp.*, 401 U.S. 493, 500 (1971), cited repeatedly in New York's brief for other purposes:

> [N]o State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not reality, of partiality to one's own.

As shown in Section I of this brief, Delaware and New York are not divided only as to factual issues. The fundamental dispute here arises from New York's emasculation of the requirement of the prior decisions of this Court that the rule for resolving escheat disputes between states concerning intangible personal property must be one which is easy and practical to administer and which will apply to all cases with-

---

8. *See* New York Abandoned Property Law §1406(1)(b).

9. The administrative proceeding provided by Section 1406(1) of the New York Abandoned Property Law does not offer Delaware the relief it seeks here. Such a proceeding is limited to claims for amounts paid to New York, without interest and subject to a one-percent service charge. *See* New York Abandoned Property Law §§1405-1407. While New York suggests otherwise (NY Br. 28), we know of no authorization for declaratory or injunctive relief in a New York administrative proceeding. It may also be noted that the PaineWebber proceeding, which raises the same issue raised here, has been pending for seven years without resolution. Under such circumstances, this Court should hear this case. *Cf. Maryland v. Louisiana*, 451 U.S. 725, 743 (1981).

out variation according to the adequacy of the debtor's records. This Court, not the New York State Comptroller, can and should resolve this dispute. As recognized in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 79 (1961):

> [I]t [is] imperative that controversies between different states over their right to escheat intangibles be settled in a forum where all the states that want to do so can present their claims for consideration and final, authoritative determination. Our Court has jurisdiction to do that.

See also R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 473 (6th ed. 1986) ("In *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), the Court directed that states with conflicting escheat claims should seek to settle their controversies by invoking the Court's original jurisdiction."). This Court should grant Delaware's motion for leave to file its complaint.

CONCLUSION

For the reasons stated in its opening brief and herein, Delaware's motion for leave to file its complaint should be granted and the dispute should be resolved according to this Court's precedents which establish that Delaware is entitled to escheat the property at issue.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, Counsel of Record
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

May 19, 1988

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
270 BROADWAY
NEW YORK, NEW YORK
10007

EDWARD V. REGAN
STATE COMPTROLLER

February 17, 1982

Honorable Daniel Gutman
P.O. Box A
Gypsy Trail Road
Carmel, New York 10512

Re: In the Matter of the Application of The Office of the State Comptroller, PETITIONER, for a certification that certain property held by Paine Webber Jackson & Curtis, Inc., RESPONDENT, be deemed abandoned property

Dear Judge Gutman:

Pursuant to the understanding previously reached and agreed upon between yourself, the undersigned, and Judith Welcom, Esq., of Bro n, Wood, Ivey, Mitchell & Petty, Counsel for Paine Webber Jackson & Curtis, Inc., the attached statement of position is being provided for your consideration. The understanding reached was that both parties would provide you with brief statements of position prior to the hearing scheduled for Friday, February 26, 1982, and exchange those with each other, approximately one week before the scheduled hearing date.

Accordingly, the attached is being furnished with a view toward apprising you of the Comptroller's legal position regarding this matter.

Thank you for your cooperation.

Very truly yours,

/s/ ROBERT L. ELLENBERG
Robert L. Ellenberg
Assistant Counsel

RLE:eb
Enc.

cc: Judith Welcom, Esq.
Brown, Wood, Ivey, Mitchell & Petty
One Liberty Plaza
New York, New York 10006

PRELIMINARY STATEMENT OF POSITION

IN THE MATTER OF THE APPLICATION OF THE OFFICE OF THE STATE COMPTROLLER, PETITIONER, FOR A CERTIFICATION THAT CERTAIN PROPERTY HELD BY PAINE WEBBER JACKSON & CURTIS, INC., RESPONDENT, BE DEEMED ABANDONED PROPERTY

Unclaimed dividends (both cash and stock) and securities are presently held in this State by Respondent, a brokerage house having its principal place of business in New York State but holding a charter of incorporation granted by the State of Delaware. Petitioner has made claim upon all such dividends and securities held for three or more years, pursuant to section 511(1) and 511(2) of the Abandoned Property Law. Those sections provide that all dividends and securities unclaimed for three years, as of December 31st of any year, held or received in this State by a broker or dealer as holder of record, shall be deemed abandoned property and reported and transferred as such to the State Comptroller no later than the 10th day of March of the following year. Generally, such dividends and securities, when received and held by a brokerage house in its "street name", and not readily attributable to customer accounts, are held for "unknown" owners.

Respondent has resisted this claim on the ground that, as a Delaware corporation, all dividends and securities held by it for "unknown" owners are reportable as abandoned property to Delaware only, under the rule enunciated by the United States Supreme Court in *Texas v. New Jersey*, 379 U.S. 674, 85 S. Ct. 626, 13 L. Ed 2d 596 (1965) and affirmed and extended by the Court in *Pennsylvania v. New York*, 407 U.S. 206, 92 S. Ct. 2075, 32 L. Ed. 2d 693 (1972).

The rule, simply stated, is that when more than one state asserts a right to escheat (or take custodially) unclaimed

property under applicable State statutes, the State in which the last known address of the creditor is located shall have priority of escheat. If such address is unknown, however, the state of corporate domicile of the debtor shall have such priority. In this matter, since not only the addresses of the creditors, but their identities as well are unknown, Respondent is asserting that the alternative to the rule must apply and the state of Respondent's incorporation, *i.e.* Delaware, is the proper escheator.

Under Delaware law (12 Delaware Code Annotated, Escheats, §§1197, 1198) any unclaimed securities and dividends held for seven years by a brokerage house incorporated in such state are deemed abandoned property and are reportable and deliverable to the State Escheator, except for securities and dividends held for owners whose last known addresses are in other states. (Ibid, §§1199, 1201, 1211). Unclaimed securities and dividends, therefore, which are held for seven years for unknown owners would be reportable and deliverable to the State of Delaware.

To the best of Petitioner's knowledge, the State of Delaware has not made claim upon respondent for any abandoned property which would be presently reportable and payable under its statute.

It is clear that the rule enunciated in the *Texas* decision would, if applied to the present factual situation, permit Delaware to escheat all dividends, interest and securities held by Respondent, so long as such dividends, interest and securities were held by the brokers for seven years and the owners thereof were unknown or their addresses were unknown. The issue, then, is whether the *Texas* rule applies to unclaimed property held by Respondent.

An initial examination of the *Texas* decision indicates that the rule applies absolutely. In *Pennsylvania v. New York*, the Court intimated that the *Texas* rules were to apply to all types of abandoned property situations. However, the *Texas* rule applies to a controversy between states over the right to

escheat a particular *res* held by a debtor subject to the jurisdiction of competing sovereignties. It does not apply to the claim of one state only against such *res* so long as the claiming state has a statute which provides for the escheat (or custodial taking) of the *res* and which provides for jurisdiction over the holding debtor. As long as all statutory conditions necessary to precede escheat have been complied with or have occurred, the *Texas* rule may not be used as a defense by the debtor if no other state has made claim, under its escheat statutes, upon the *res*. Any claim on behalf of the state of Delaware must be exercised by such state; it cannot be advanced by the holder of unclaimed property. It should be noted that, in the *Texas v. New Jersey* and *Pennsylvania v. New York* decisions cited *supra*, all four states had jurisdiction of and escheat coverage over the debtor, and all states had made formal claim upon the debtor for the transfer of the *res* as abandoned property.

In this instance, the Delaware statute has jurisdiction over the debtor and the *res* in question [Delaware Code Annotated §1198(6)(9)], yet it requires a seven year period of inactivity prior the *res* becoming subject to its terms (§1198(8)). Similarly, New York has jurisdiction over the debtor (Abandoned Property Law §510) and the *res* (§511), yet, in New York, the dormancy period preceding abandonment of the *res* in question is three years. Since the New York statute would impact upon the *res* in question prior to the Delaware statute, New York's right to assert a valid claim upon PWJC is clear.

It is important to note that in the *Texas* case, the Court clearly indicates that the state of corporate domicile of the debtor, in this instance, Delaware, does not, and never can attain a status amounting to the *paramount* escheator. The Court said:

> "... [T]he state of corporate domicile should be allowed to cut off the claims of private persons only, retaining the property for itself *only until some other state comes forward with proof that it has a superior right to escheat.*" [Emphasis added]

PROOF OF SERVICE

I, RICHARD L. SUTTON, certify that I am counsel of record for plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 19th day of May, 1988, I served copies of the foregoing Plaintiff's Reply Brief In Support Of Its Motion For Leave To File Complaint, on all parties required to be served by depositing such copies, first-class postage prepaid, in a United States Post Office, addressed as follows:

Christopher Keith Hall, Esquire
Assistant Attorney General
Attorney General's Office
120 Broadway
New York, New York 10271

Richard L. Sutton
Counsel of Record for Plaintiff,
the State of Delaware
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899
(302) 658-9200

Supreme Court, U.S.
FILED
JUL 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

ANSWER

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
of Counsel

July 27, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 111 Original

In The

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

ANSWER

The State of New York, defendant, by its counsel, for its answer to the complaint of the State of Delaware, says:

1. It admits the allegations in paragraph 1 of the complaint.

2. It admits the allegation in paragraph 2 of the complaint that there is a dispute between the two states but denies that the dispute is ripe and within the original jurisdiction of this Court.

3. It admits the allegation in paragraph 3 that brokers doing securities brokerage business in New York and incorporated in Delaware ("debtor brokers") hold or held monies and other intangible property, but it denies that it wrongfully escheated such property. It is without knowledge or information sufficient to form a belief as to

the truth of the allegations in the second sentence of paragraph 3 that the debtor brokers have no identification or last known address of anyone claiming to be the *beneficial* owner of the distributions held or formerly held for the account of customers.

4. It denies the allegations in paragraph 4 of the complaint that Delaware is entitled to escheat distributions held or formerly held by debtor brokers. The remainder of paragraph 4 states legal conclusions to which no response is required.

5. It admits the factual allegations in paragraph 5 of the complaint except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that no other state besides New York is asserting a right contrary to Delaware's claims.

6. It denies the allegations in paragraph 6 of the complaint to the extent that they suggest that no brokerage corporation with a New York trading address incorporated in Delaware would be entitled to claim any of the abandoned property at issue in this case and states that the terms of section 1404 of the New York Abandoned Property Law speak for themselves.

7. It admits that the corporations listed in paragraph 7 have offices in New York, conduct business in New York, and were incorporated in Delaware at the time the complaint was filed, except for The First Boston Corporation, which has been incorporated in Massachusetts since 1932. It is without knowledge or information sufficient to form a belief as to the truth of the allegation that each of their predecessors were incorporated in Delaware.

8. It admits the allegations in the first and second sentences of paragraph 8 of the complaint. It admits that debtor brokers regularly allocate to the accounts of their customers amounts equal to the distributions to which they are beneficially entitled, but denies that these allocations always occur as payments are received from the issuer of the underlying securities.

9. It admits that, in certain instances, the debtor brokers may be unable to identify the *beneficial* owners of distributions. It admits the allegation that a debtor broker may sell its customer's securities in the open market and that a broker ("creditor broker") buying such securities in its own name (assuming that this is what the plaintiff means by "ultimate acquiror") may fail to remove the debtor broker's name as record owner of such securities before the record date on which a distribution becomes payable to that debtor broker. It is without knowledge or information sufficient to form a belief as to the truth of the allegation in the third sentence of paragraph 9 concerning the circumstances under which a debtor broker will know who the *beneficial* owner of a distribution may be after the sale of the underlying security to a creditor broker or the address of that *beneficial* owner. It denies that when no claim is made for a distribution that the debtor broker holds property of unknown creditors or creditors whose address cannot be determined from the books and records of the debtor broker.

10. It denies the factual allegations in paragraph 10 of the complaint except that it admits that since July 13, 1971, Delaware has had an Escheat Law which provides for the escheat of the property claimed by Delaware at issue in this case and states that the terms of sections

1198(6), (8), and (10) of the Delaware Escheat Law speak for themselves.

11. It admits the factual allegation in paragraph 11 of the complaint to the extent that New York has taken custody of abandoned property held by debtor brokers, but denies the remaining allegations of that paragraph.

12. It admits that since April 1, 1952, New York has provided that its Comptroller may take custody of personal property held by any corporation engaging in New York in the purchase, sale, or exchange of securities for or on behalf of any customers, but states that the terms of article V-A of the New York Abandoned Property Law speak for themselves.

13. It admits the factual allegation in paragraph 13 of the complaint that New York formerly published and disseminated a book entitled *Abandoned Property Law Handbook for Brokers and Dealers*, but states that this book has been superceded by a volume entitled *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988), a copy of which has been lodged with the Clerk.

14. It admits that the text of the superceded *Abandoned Property Law Handbook for Brokers and Dealers* quoted in paragraph 14 of the complaint is accurate, but it denies that the characterization of New York's position is accurate.

15. It admits that the text of the superceded *Abandoned Property Law Handbook for Brokers and Dealers* quoted in paragraph 15 of the complaint is accurate, but denies that New York claims that it is entitled to retain

custody of property abandoned by creditors which do not have New York addresses.

16. It admits the allegations in the first sentence of paragraph 16 of the complaint to the extent that New York has taken custody pursuant to its Abandoned Property Law of abandoned property held by debtor brokers and denies the remainder. It admits the allegations of the second sentence of that paragraph to the extent that most of the debtor brokers have complied with their obligations under the Abandoned Property Law, but is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the reasons that debtor brokers may have given for refusing payment to Delaware of abandoned property. The terms of section 1404 of the Abandoned Property Law speak for themselves.

17. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in paragraph 17 of the complaint, but states that at the time the complaint was filed, at least three debtor brokers had refused to turn over abandoned property to the Comptroller.

18. It admits the allegation in the first sentence of paragraph 18 of the complaint to the extent that Paine Webber Incorporated ("Paine Webber") has declined to deliver abandoned property to the Comptroller, but denies that Delaware has correctly characterized Paine Webber's position. It admits that New York has commenced an administrative proceeding which is still pending against Paine Webber seeking recovery of abandoned property.

19. It admits the allegation in the first sentence of paragraph 19 of the complaint to the extent that Smith Barney, Harris Upham & Co. Incorporated ("Smith Barney") has refused to deliver abandoned property to the Comptroller, but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the reasons for the refusal because it has never received a formal written statement of position from Smith Barney. It states that New York has not yet commenced an administrative proceeding against Smith Barney to recover abandoned property in Smith Barney's possession.

20. It admits the allegation in the first sentence of paragraph 20 to the extent that Kidder Peabody & Co. Incorporated ("Kidder Peabody") has refused to deliver abandoned property to the Comptroller, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the reasons for the refusal because it has never received a formal written statement of position from Kidder Peabody. It states that New York has not yet commenced an administrative proceeding against Kidder Peabody to recover abandoned property in Kidder Peabody's possession.

21. It admits the allegations in the first sentence of paragraph 21 to the extent that New York has taken custody of substantial amounts of abandoned property held by debtor brokers which remains unclaimed by creditor brokers whose trading addresses, as shown by the books and records of the debtor brokers, are in New York, but denies that it took custody of such property wrongfully. It admits the allegations in the second sentence of the paragraph. It is without knowledge or information

sufficient to form a belief as to the truth of the allegations in the third sentence of that paragraph concerning what information the plaintiff received. It admits the allegations in the remainder of the paragraph except that it denies New York took property rightfully belonging to Delaware or that the creditors or their addresses cannot be determined from the books and records of the debtor corporations.

22. It admits the allegations in paragraph 22 of the complaint to the extent that there is a dispute between Delaware and New York concerning abandoned property, but denies that the dispute is a "controversy" within the meaning of article III, section 2 of the United States Constitution.

23. It denies the allegations in paragraph 23 of the complaint.

24. It denies the allegations in paragraph 24 of the complaint.

25. It denies the allegations in paragraph 25 of the complaint.

26. It denies the allegations in paragraph 26 of the complaint.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Delaware failed to file a claim with the New York State Comptroller before commencing this action.

2. Delaware has failed to exhaust administrative remedies.

3. Delaware's claims are barred by laches and waiver.

4. Delaware has failed to state a claim upon which relief can be granted.

5. Under existing law, Delaware is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined.

WHEREFORE, this Court should enter judgment dismissing the complaint.

Dated: New York, New York
July 27, 1988

Respectfully submitted,

O. Peter Sherwood
Solicitor General

Lawrence S. Kahn
Deputy Solicitor General

Christopher Keith Hall
Assistant Attorney General
Counsel of Record

Laura M. Nath
Assistant Attorney General
of Counsel

Robert Abrams
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

MOTION FILED
JAN 7 1989

(7)

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

V.

STATE OF NEW YORK, Defendant

* * *

MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF OF THE STATE OF TEXAS IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

* * *

Of Counsel:

Professor Robert Hamilton
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

Professor Charles Alan Wright
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

Anne L. Schwartz
General Counsel
Texas State Treasury
Department
L.B.J. State Office Bldg.
Austin, Texas 78711
(512) 463-5971

Jim Mattox
Attorney General of Texas

Mary F. Keller
First Assistant
Attorney General
Counsel of Record

Sarah J. Shirley
Assistant Attorney General
Chief, Finance Division

P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2018

Attorneys for The
State of Texas

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE COMPLAINT IN INTERVENTION 1

COMPLAINT IN INTERVENTION 7

EXHIBITS TO COMPLAINT

EXHIBIT 1 - THE DISTRIBUTION SYSTEM AND UNCLAIMED PROPERTY CHART 41

EXHIBIT 2 - PAYMENT FLOWCHART 43

EXHIBIT 3 - DTC LETTER DATED NOV. 28, 1988 45

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION 49

EXHIBITS TO BRIEF

EXHIBIT A - TEXAS PROPERTY CODE 65

EXHIBIT B - AMENDMENTS TO § 300, NEW YORK ABANDONED PROPERTY LAW 126

PROOF OF SERVICE 134

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, Plaintiff in Intervention

V.

STATE OF NEW YORK, *Defendant*

* * *

MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

* * *

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, *Plaintiff*

V.

STATE OF NEW YORK, *Defendant*

* * *

MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Texas, a sovereign state of the United States of America, by and through Attorney General Jim Mattox, moves the Court for an order permitting it to intervene as Plaintiff in the above-entitled cause and permitting its proposed Complaint in Intervention, attached hereto, to be filed in this action. In support of this Motion, the State of Texas would show the Court as follows:

I.

1. On or about May 31, 1988, this Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and Defendant State of

New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("Excess Receipts"), held by securities brokerage houses incorporated in Delaware.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. As specifically and particularly set forth in the attached proposed Complaint in Intervention, the State of Texas claims a portion of the Excess Receipts[1] which constitute the unclaimed property that is the subject matter of this controversy. Texas claims a portion of these Excess Receipts for the reason that they constitute a debt owed by the issuing entity (the "Issuer") to the securities' Beneficial Owner. If the identity of the Beneficial Owner is unknown, the Excess Receipts should be remitted to the state of incorporation of the Issuer under that state's unclaimed property law. Texas accordingly claims those Excess Receipts held or formerly held by Delaware brokerage firms generated by Issuers incorporated in the State of Texas.

4. As specifically and more particularly set forth in the attached proposed Complaint in Intervention, the amount of Excess Receipts in issue in this litigation that Texas is entitled to claim is presently unknown, but is very substantial.

5. The decision of the Court in this action will conclusively determine the right of Texas to claim and take possession of these Excess Receipts. If the argument of either Delaware or New York is accepted,

---

[1] In the Complaint in Intervention, Texas has defined certain terms. Those definitions, which are also employed in this Motion, are incorporated hereby by reference.

Texas will be forever precluded from taking possession of unclaimed property of this nature.

6. Because Delaware, New York and Texas each assert conflicting claims to the subject Excess Receipts, Texas' interest is not adequately represented by the existing parties.

7. Based on the foregoing, Applicant is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure.

II.

8. Alternatively, Texas urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

9. As specifically and more particularly set forth in the attached proposed Complaint in Intervention, Texas is also requesting the Court to consider and determine its claim to certain Additional Excess Receipts, consisting of excess receipts held by the Depository Trust Company and excess receipts which have arisen in connection with distributions made by municipal and other governmental issuers ("Additional Excess Receipts"). Texas urges the Court to consider such Additional Excess Receipts in connection with the lawsuit for the reason that they come into existence and acquire their character in the exact same manner as the Excess Receipts under consideration. Additionally, Texas claims a portion of the Additional Excess Receipts for the same reason and on the same basis that it claims a portion of the Excess Receipts already at issue. Clearly, a determination of Texas' right to claim and take possession of these Additional Excess Receipts involves questions of law and fact already before the Court.

10. As specifically and more particularly set forth in the attached proposed Complaint in Intervention, Texas cannot even estimate the amount of Additional Excess Receipts subject to its claim. However, the amount is likely to be tremendous.

11. The intervention of Texas in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the original parties.

III.

12. This Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." Id. at 79. See, also, *Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claims, that Texas seeks by urging this Court to grant leave to intervene herein.

Wherefore, Texas prays that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached Complaint in Intervention.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General
Counsel of Record

SARAH J. SHIRLEY
Assistant Attorney General
Chief, Finance Division
P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2018

OF COUNSEL:

PROFESSOR ROBERT HAMILTON
727 East 26th Street
Austin, Texas 78705
512) 471-5151

PROFESSOR CHARLES ALAN WRIGHT
27 East 26th Street
Austin, Texas 78705
(512) 471-5151

ANNE L. SCHWARTZ
General Counsel
Texas State Treasury Department
L.B.J. State Office Building
(512) 463-5971

ATTORNEYS FOR THE STATE OF TEXAS

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, *Plaintiff in Intervention*

V.

STATE OF NEW YORK, *Defendant*

* * *

COMPLAINT IN INTERVENTION

* * *

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, *Plaintiff in Intervention*

V.

STATE OF NEW YORK, *Defendant*

* * *

COMPLAINT IN INTERVENTION

The State of Texas, Plaintiff in Intervention, by Jim Mattox, its Attorney General, with leave of the Court first had, files this Complaint in Intervention in the above styled and numbered cause, and complains and alleges as follows:

I.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II.

PENDING ACTION

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

III.

INTEREST AND CLAIM OF PLAINTIFF IN INTERVENTION

4. Plaintiff in Intervention, the State of Texas, acts by and through the Attorney General of Texas, the official of the State of Texas charged with the duty under the Constitution and the laws of the State of prosecuting unclaimed property suits at the request of the Treasurer of the State of Texas and of representing the State of Texas in litigation generally.

5. At present, this litigation involves a dispute as to which state is entitled to the custodial taking of certain unclaimed, intangible personal property ("Excess Receipts"), which comes into being and acquires its character as unclaimed property in the context of securities transactions. The Excess Receipts consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of

the foregoing ("Distributions"), held or formerly held by brokerage firms incorporated in the State of Delaware. The Excess Receipts are Distributions received by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled. The Excess Receipts are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

6. Plaintiff in Intervention claims a portion of the Excess Receipts. Additionally, Plaintiff in Intervention seeks to have this Court consider and determine rights to certain additional Excess Receipts ("Additional Excess Receipts") which are not yet part of this litigation which involves the same issues. These Additional Excess Receipts consist of: (a) excess receipts presently being remitted to New York which are held by the Depository Trust Company ("DTC"), a national clearinghouse for the settlement of trades in corporate and municipal securities; and (b) excess receipts arising from unclaimed principal and interest payments on municipal and state bonds which have never been remitted to any state. Additional Excess Receipts are of the same character and come into existence in the exact same manner as the Excess Receipts at issue in the principal case and will necessarily be controlled by the Court's ruling in this case.

7. Texas is entitled to a portion of the Excess Receipts at issue in this litigation (and to a portion of the Additional Excess Receipts it seeks to have the Court consider) because they constitute a debt of the entity ("Issuer") initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ("Beneficial Owner") who has the economic rights to the security, including the entitlement to Distributions.

8. If the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the Issuer's state of incorporation when held by the Issuer's Paying Agent (defined in part IV) so it should be similarly remitted to the state of incorporation of the Issuer when held by other agents in the securities holding, transfer, and distribution system ("Distribution System"). Distributions generated by Issuers incorporated in the State of Texas and those generated by Texas municipalities which are unclaimed and whose Beneficial Owner is unknown, should be returned to the State of Texas. The claim of Plaintiff in Intervention is based upon the practical reality of the manner in which securities are traded and Distributions are paid, and relies upon a strict interpretation of this Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

9. By this action, Plaintiff in Intervention seeks a judgment that New York pay to Plaintiff in Intervention all Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Texas and those that are attributable to Texas municipalities. Plaintiff in Intervention further seeks a declaration that Texas has the right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts without interference from any other state. Plaintiff in Intervention additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such Excess Receipts and Additional Excess Receipts, and from expending any such sums collected, but presently unspent, which are attributable to Issuers incorporated in the State of Texas and to Texas

municipalities, until such time as this controversy is resolved.

10. Plaintiff in Intervention asserts its claim pursuant to Chapter 72, Tex. Prop. Code Ann. §72.001, *et seq.* (Vernon Supp. 1989), ("Texas Property Code") which provides, in essence, for the custodial taking of abandoned or unclaimed tangible or intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been asserted within the applicable dormancy period, which for most types of personal property is three years.[2] Chapter 72 of the Texas Property Code is set forth in Exhibit "A" attached to Plaintiff in Intervention's Brief in Support of Motion for Leave to File.

IV.

DEFINITIONS

11. The process by which securities Distributions are made and which gives rise to the Excess Receipts is complex. Because the process has evolved within the last twenty years, it has not been extensively studied and is generally understood only by persons who work within the Distribution System. In order to assist the Court, Plaintiff in Intervention has prepared two charts that graphically illustrate the Distribution System and which are attached hereto as Exhibits "1" and "2". For the Court's further convenience, Plaintiff in Intervention has assembled the

---

[2]Since 1962, the State of Texas has provided by statute that the State shall take custodial possession of unclaimed or abandoned property of unknown owners. Chapter 72 of the Property Code repealed and replaced Tex.Rev.Civ.Stat.Ann. art. 3272a (Vernon 1981).

following definitions which will be used throughout the remainder of this Complaint.

"Additional Excess Receipts" means Distributions received by DTC for the benefit of DTC Participants which exceeds the amount paid to DTC Participants. These funds are maintained in the "Unclaimed Dividends Account" at DTC until after the expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York. "Additional Excess Receipts" also means unclaimed principal and interest payments of bonds, debentures, or other debt obligations attributable to corporate and Governmental Issuers. "Beneficial Owner" or "Customer" means an entity or individual who acquires and owns the economic rights with respect to a security, including entitlement to Distributions, and the power to sell or dispose of the security.

"Book Entry Accounting" means the computerized accounting process by which ownership interests in securities are recorded and Distributions are proportionally allocated and recorded.

"Book Entry Certificate System" means the process of reflecting the ownership of securities only through computerized notations in the books and records. In this Book Entry Certificate System the Issuer initially issues a single Physical Certificate (or one Physical Certificate for each maturity and interest rate) in the name of DTC or Cede & Co., its Nominee. Cede & Co. is the only Record Owner, as reflected on the Issuer's books and records. Thereafter, all ownership of securities is evidenced by a computer printout confirmation statement of a securities transaction, ("Book Entry Certificate"), rather than by possession of a Physical Certificate.

"Cede & Co." is the principal Nominee used by the Depository Trust Company.

"Depository Trust Company" ("DTC") is a trust company incorporated under the banking laws of New York, and is the national clearing house created by the brokerage firms and banks in cooperation with the New York Stock Exchange.[3] As a clearing house, it provides a system for the settlement of trades in corporate and municipal securities between brokerage firms without the delivery of Physical Certificates. It also provides a system for the collection and disbursement of Distributions for the ultimate benefit of Beneficial Owners or Customers by making federal wire transfers to banks for the accounts of DTC Participants. DTC is the principal Intermediary in the modern Distribution System. Access to the Depository Trust Company is limited solely to DTC Participants.

"Distributions" means payments of dividends, profits, principal, interest and securities representing any of the foregoing.

"Distribution System" means the chain of transactions between the Issuer and the Beneficial Owner, which includes all Intermediaries in the trading of securities and the receipt and disbursement of Distributions.

"DTC Participant" means the brokerage firms and banks who are members of the Depository Trust

---

[3]Plaintiff in Intervention believes that the Depository Trust Company is one of two clearinghouses operating in the United States. Any reference to the Depository Trust Company or DTC shall mean and include all clearinghouses.

Company.[4] All of the brokerage firms identified by Delaware in its Complaint are DTC Participants.

"Excess Receipts" means Distributions received by brokerage firms incorporated in Delaware for the benefit of their Customers which exceeds the amounts which the brokerage firms are entitled. These funds are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

"Ex Dividend Date" or "Ex Date" is the date determined pursuant to rules of the securities exchanges and the National Association of Securities Dealers to establish whether a buyer or seller of securities is entitled to a Distribution that has been previously announced but not as yet paid. Under these rules, Ex Dividend Date is five business days before the Record Date. Buyers of securities in transactions that occur before the Ex Dividend Date are entitled to the Distribution; buyers of securities in transactions that occur on or after the Ex Dividend Date are not entitled to the Distributions even though they might own the securities on the Record Date.

"Governmental Issuer" is a state or any political subdivision thereof authorized under state law to issue municipal bonds, notes or other obligations.

"Intermediary" means any entity that acts as a conduit in connection with the receipt and disbursement of any part of a Distribution in the process by which that Distribution moves from the Issuer to a Beneficial Owner or Customer. The

---

[4]DTC Participants as of December 31, 1987, are listed in the DTC Annual Report, a copy of which has been filed with the Clerk.

principal Intermediaries are Paying Agents, the Depository Trust Company, DTC Participants and other brokerage firms.

"Issuer" means the entity initially issuing the shares of stock, bonds, debentures or other securities instruments.

"Nominee" means an entity, usually a general partnership, that is named for purposes of convenience as the Record Owner of securities owned by or for the account of Intermediaries or Beneficial Owners.

"Paying Agent" means an entity, usually a bank, that is responsible for receiving Distributions from the Issuer and disbursing the Distributions on behalf of the Issuer. A Paying Agent may also maintain the stock or bond registration books as Registrar. The Paying Agent is the first Intermediary in the Physical Certificate System. It makes payments to Record Owners as reflected on the Issuer's books and records. In modern practice the majority of outstanding securities are held of record, as shown on the Issuer's books and records, in the name of Cede & Co. Most of the remaining Record Owners are large institutional investors such as insurance companies, mutual funds, and brokerage firms trading in the names of their Nominees.

"Physical Certificate" means an instrument prepared by the Issuer of a security that reflects the named ownership of the security as shown on the records of the Issuer, along with the amount, type, interest rate, maturity date, if any, and all other such relevant terms.

"Physical Certificate System" means the process of issuing Physical Certificates by the Issuer in the name of each individual or entity whose name appears

on the Issuer's books and records as the Record Owner. In modern practice, as brokerage firms come into possession of Physical Certificates, these Physical Certificates are reregistered in either the name of Cede & Co. or a Nominee name.

"Record Date" for a Distribution is the date established by the Issuer to determine the identity of the Record Owner to whom the Distribution is to be made.

"Record Owner" means the person in whose name the ownership of a security is recorded on the books of the Issuer. In modern securities practice the Record Owner is almost always either an Intermediary, (usually Cede & Co.), a Nominee used by an institutional investor.

V.

BACKGROUND

12. Radical changes have occurred in the last twenty years with respect to the manner in which securities are traded and held, and Distributions are paid. A brief description of the evolution of the Distribution System is necessary to provide the background of this litigation and to facilitate a full understanding of the complex issues it involves.

13. Prior to 1970, securities transactions in shares of stock were effected through the actual transfer of Physical Certificates. In securities exchanges and over-the-counter transactions, the brokerage firm representing the Customer who was selling securities delivered Physical Certificates to the brokerage firm representing the Customer who was buying securities. The purchasing Customer would then normally receive a Physical Certificate in his

name. That Customer then became the Record Owner of the securities, and Distributions were thereafter made by the Issuer's Paying Agent by check mailed directly to the Customer. If the Customer were involved in active securities speculation, he might request that the Physical Certificates remain in the street name of his brokerage firm. He would then rely on his brokerage firm to produce the Physical Certificate when necessary to complete a subsequent resale of the securities.

14. The use of Physical Certificates carried with it a considerable degree of risk. All Physical Certificates are negotiable instruments, and are vulnerable to theft and forgery. Physical Certificates are also subject to being lost or misplaced, or destroyed in connection with some type of casualty loss. Those Customers who chose not to hold their own Physical Certificates ran the additional risk that the brokerage firm might be unable to account for the Physical Certificates, or, worse yet, the brokerage firm might become insolvent and the Customers would become unsecured creditors.

15. The handling of Physical Certificates during this period was a major and troublesome aspect of the securities business. Issuers employed Paying Agents or stock transfer agents whose primary functions were to reregister Physical Certificates, cancel old Physical Certificates, and issue new Physical Certificates. The volume of transactions processed through the brokerage firms and these transfer agents was tremendous.

16. Prior to 1983 securities transactions in bonds, debentures and other long term instruments of indebtedness were also handled through Physical Certificates. However, these Physical Certificates involved an even greater risk because they were often

made payable to bearer. Anyone who possessed the debt instrument was, upon presentation, entitled to payment. Interest was traditionally payable only through a process of physically clipping coupons off the bearer bonds and delivering them to the Issuer's Paying Agent. Before the 1983 changes in the federal tax law, some Issuers did issue registered bonds or debentures to named owners, which instruments could then be transferred by endorsement, much like stock, but the greatest majority were issued in bearer form. Today all municipal bonds are issued in registered form, and interest is paid by check mailed to the Record Owner by the Issuer's Paying Agent.

17. During the late 1960s and early 1970s, the traditional manner of handling securities transactions described above began to break down under the sheer weight of the increased volume of transactions. The "back offices" of brokerage firms became inundated with paper, and the tracing of transactions became increasingly difficult. The entire securities industry was confronted with a paperwork and record-keeping crisis inevitable in a system in which trillions of Physical Certificates were physically moved each year.

18. The present Distribution System for handling securities transactions evolved because of two major changes in the method by which these transactions were processed. Enactment by Congress of the Securities Investor Protection Act of 1970, 15 U.S.C. §§78aaa-78lll, permitted Customers to accept bookkeeping entries without regard to the location of their Physical Certificates without risking the loss of capital in the event of brokerage firm failure. Secondly, the Depository Trust Company was created to serve as a nationwide clearinghouse. Brokerage firms who became DTC Participants could now deal with each other through Book Entry Accounting on the records of DTC, without the delivery of any Physical

Certificates, by simply endorsing and reregistering all Physical Certificates in the name of Cede & Co. thereby making Cede & Co. the only Record Owner, and depositing all these Physical Certificates at DTC. The Distribution System has now evolved even further. An Issuer may choose to issue securities in the Book Entry Certificate System so that a single Physical Certificate is issued in the name of Cede & Co. on behalf of DTC. Thereafter, all trades occur in book entry form. In the Book Entry Certificate System, no entity other than DTC has the authority to receive Physical Certificates.

19. The shift to Book Entry Accounting for recording the beneficial ownership of securities is now virtually complete. Less than one percent (1%) of all securities transactions involve the actual delivery of Physical Certificates. Most Physical Certificates outstanding today are held in street name, with Cede & Co. being the predominant holder. In well over fifty percent (50%) of new issues, no Physical Certificates are available to Customers at all because the Issuer used the Book Entry Certificate System.

VI.

CLAIMS OF DELAWARE AND NEW YORK

20. Delaware and New York each argue that their respective claims to the Excess Receipts are supported by the rulings of this Court in *Texas v. New Jersey, supra*, and *Pennsylvania v. New York*, 407 U.S. 206 (1972). These cases establish the principle that unclaimed property is subject to being remitted to the state of the last known address of its owner. If that address is unknown, the property is to be remitted to the state of incorporation of the debtor.

21. Delaware asserts the right to claim the Excess Receipts at issue herein on the basis that the

identity of said property's Beneficial Owner, whom Delaware equates with a creditor, is unknown. Therefore, the Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firm holding such funds, which is characterized by Delaware as the debtor.

22. New York, on the other hand, argues that the property's Beneficial Owner is always paid the Distributions to which he is entitled. The Beneficial Owner therefore has no claim to the Excess Receipts and his identity is irrelevant to the analysis of rights at issue herein. Instead, contends New York, the last known address of the brokerage firms that were underpaid, characterized by New York as the "creditor" firms, determines to which state the overpayments held by the "debtor" firms should be paid. Since most such brokerage firms have New York trading addresses, New York is entitled to claim the Excess Receipts.

23. The arguments of both Delaware and New York are based upon narrow technical and legalistic analyses of a complex Distribution System, which is more fully described in Part VI below. Both Delaware's designation of the brokerage firms as "debtors", and New York's classification of the "underpaid" brokerage firms as "creditors", fail to properly characterize the relationships of the various parties to ownership and Distribution transactions of the present Distribution System. In this Distribution System, at least two Intermediaries are *always* involved in the routine processing of ownership trades and moving Distributions between the Issuer and the ultimate Beneficial Owner/Customer. Delaware is basically contending that the state of incorporation of the *last* Intermediary, the brokerage firm holding the Excess Receipts, determines the state to which all the unclaimed property is to be remitted. New York

contends that all Excess Receipts should be remitted to New York for the reason that the principal business offices and headquarters of most of the Intermediary brokerage firms are located in the New York City area. Under either argument, the place of incorporation of mere Intermediaries, who act simply as transfer agents and who themselves as a rule make no claim to the Distributions,[5] will determine which state can claim and take possession of hundreds of millions of dollars. As a practical matter under either states' theory, only two states would be legally authorized to claim the great bulk of these moneys.

VII.

CLAIM OF TEXAS

24. In both *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra*, the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both equitable and easy to administer. In *Texas v. New Jersey, supra*, Mr. Justice Black adopted a rule that "involves a factual issue simple and easy to resolve and leaves no legal issue to be decided" and that "will tend to distribute escheats among the states in the proportion to the commercial activities of their residents." The rule was clear under these legal principles that when a Paying Agent could not find a last known address for the Record Owner, unclaimed dividends should be remitted to the state of incorporation of the Issuer. The same principle should be adopted in this litigation since the

---

[5]Delaware notes that one brokerage firm, Paine, Webber, Inc. may claim entitlement to Excess Receipts. Under the theory set forth, any brokerage firm desirous of asserting such claim who has traced the transaction sufficiently to identify entitlement to the funds could submit its claim to the Issuer's state of incorporation for payment.

addition of more Intermediaries to the chain of distribution should not affect the entitlement of states to the Excess Receipts. This would also return these moneys to the states pro rata according to each state's commercial activity, and would mitigate the harshness of the "winner take all" positions espoused by both Delaware and New York. This is the resolution urged by Plaintiff in Intervention.

VIII.

DESCRIPTION OF THE DISTRIBUTION SYSTEM: PHYSICAL CERTIFICATES

25. Whenever securities are to be issued, the Issuer must first choose whether to use the Physical Certificates System or the Book Entry Certificate System. This part of the Complaint assumes that the Issuer selects the Physical Certificate System and opts to issue Physical Certificates in registered form, *e.g.*, stock, if it is an equity transaction, or bonds/debentures if it is a debt transaction.

26. The Physical Certificates are purchased at closing by initial underwriters, who are DTC Participants. The DTC Participants then immediately re-register the Physical Certificates in the name of the Nominee of DTC, Cede & Co. The Physical Certificates are deposited at DTC, where they are effectively "parked" until after maturity or abandonment. All trades of Physical Certificates between or among DTC Participants occur only on the books and records of DTC.

27. By means of the foregoing, Cede & Co. becomes the Record Owner of all Physical Certificates deposited with DTC, although neither DTC nor Cede & Co. claims or has any legal ownership rights to, or

interest in, the Physical Certificates except as custodian. Indeed, DTC characterizes itself as merely a collections and clearing agent.

28. Purchases of securities in the form of Physical Certificates held at DTC are made through brokerage firms who are, or act through, DTC Participants. These purchases are made in book entry form only. Customers do not receive from the Issuer or from their DTC Participant Physical Certificates evidencing their ownership interest in the securities. Rather, each Customer maintains an account at a DTC Participant or other brokerage firm. The books and records of the DTC Participant or other brokerage firm constitutes the only evidence of each Customer's legal ownership of an undivided interest in the Physical Certificates held at DTC. When such "beneficial ownership" is purchased, the DTC Participant or other brokerage firm sends its Customer a transaction statement confirming and setting forth the terms of the purchase. In fact, DTC was created to eliminate the need to send Physical Certificates back to the Issuer's Paying Agent for reregistration in the name of the new owner or his brokerage firm each time a sale or transfer of such Physical Certificates occurred between the brokerage firms. Transactions at DTC are accomplished by the creation of what are, in effect, fungible Physical Certificates, whose only indices of ownership are evidenced on the books and records of DTC and DTC Participants.

29. The Customer who wants a Physical Certificate must make a request through a DTC Participant to have the Physical Certificate reregistered in her name. The DTC Participant then instructs DTC to endorse the appropriate amount of Physical Certificates purchased by its Customer and deliver those Physical Certificates to the Issuer's

Paying Agent for reregistration. The reregistration process takes six to eight weeks.

30. Three (3) sets of books and records reflect the interests of the respective parties in Physical Certificates. The books and records of the Issuer (or its Paying Agent) reflect that Physical Certificates are held by Cede & Co. The books and records of DTC evidence the amount and identity of Physical Certificates held by each DTC Participant. The books and records of each DTC Participant evidence the beneficial ownership of its respective Customers. Thus, there are at least three (3) sets of Record Owners evidenced on three (3) separate sets of books and records in the Distribution System.

31. Since Physical Certificates are registered in the name of Cede & Co., Distributions are paid by or at the direction of the Issuer directly to Cede & Co. Each Distribution received by DTC is allocated among DTC Participants in accordance with the ownership records of DTC on Ex Date. Payment of the Distribution to DTC Participants is the responsibility of DTC. Payment of the Distribution to the Customers or Beneficial Owners is the responsibility of DTC Participants. Immediately after DTC wires payment to the accounts of DTC Participants at their New York headquarters, DTC Participants wire funds to each of their brokerage firms' branch offices in every state around the country. The local Customers are then paid the amount of the Distribution to which they are entitled according to their beneficial ownership interests.

32. As there are at least three (3) sets of books and records evidencing record ownership, there are also at least three (3) sets of books and records for every Distribution -- those maintained by the Issuer, by DTC, and by each DTC Participant and their branch offices.

33. After it receives payment from DTC and credits its Customer accounts, each brokerage firm compares the Distribution it has paid out to its Customers, the Beneficial Owners, with the Distribution it has received from DTC. If all records are accurate, and nothing has changed since the Ex Date, the amounts of the Distributions match. If, however, there have been transfers of beneficial ownership which have not been promptly recorded or which have occurred on or around the Ex Date, or if mistakes have been made in the recording or clearing of transactions by DTC or DTC Participants, some brokerage firms may receive an excess payment. It is this type of excess payment, referred to as Excess Receipts by Plaintiff in Intervention, that is presently in issue in this lawsuit.

34. The following example illustrates the foregoing:

On January 1, Customer X (Beneficial Owner) purchases 100 shares of the stock of Texas, Inc., through Broker A, a DTC Participant. Broker A purchases the stock from Broker B, also a DTC Participant, Broker A credits the account of Customer X, also on January 1.

Texas, Inc. declared a dividend of $5 per share with Ex Date of January 2nd. Broker A credits the account of Customer X $500 for the dividend payment. However, the transfer of interest in the stock from Broker B to Broker A has not been recorded, so Broker B is credited by DTC with $500 in dividends.

Broker A has been underpaid, but Broker A goes ahead and pays its Customer. Broker B has been overpaid, or has received Excess Receipts.

35. Most DTC Participants who are underpaid decline to trace individual securities transactions through the Distribution System to identify the DTC Participant that received the Excess Receipts, and fail to utilize the DTC claims procedure to recover the amount of said Excess Receipts. It is best expressed as "it all comes out in the wash" attitude because of the huge volume and the frequency of occurrence. If accounts are to be settled among DTC Participants, such must be done, pursuant to DTC rule, through Cede & Co. and within a short period of time. Moreover, in some cases tracing may not be possible at all because of inadequate or incomplete records. The huge volume of transactions has created such a gnarled system, involving billions of entries on a paper trail, that tracing is generally neither cost-effective nor feasible. In 1987 DTC Participants delivered 9.8 trillion dollars of securities through Book Entry Accounting.

DESCRIPTION OF DISTRIBUTION SYSTEM: BOOK ENTRY CERTIFICATE SYSTEM

36. This part of the Complaint assumes that the Issuer has chosen to issue securities in Book Entry Certificate form. Book Entry Certificates were created to relieve the tremendous paper burden created by Physical Certificates. Under this method of issuing stocks and bonds, the Issuer issues one Physical Certificate (or one Physical Certificate for each maturity and each interest rate), in the name of Cede & Co. as the Record Owner. At closing, the underwriting DTC Participants instruct Cede & Co. to credit their respective accounts with their appropriate portion of Book Entry Certificates in exchange for cash paid directly to the Issuer. Thereafter, all subsequent trades are conducted solely by computerized credits and debits to DTC Participant accounts, and computerized credits and debits by DTC Participants of

the accounts of their Customers, the Beneficial Owners. The Customers are told from the beginning that they are not entitled to receive, nor will they ever receive, Physical Certificates, and that all notices of redemption, tender offers, mergers, stock dividends and cash dividends will be sent only to Cede & Co. DTC Participants are advised by Cede & Co. of such events, and DTC Participants are responsible for providing their Customers as Beneficial Owners with this notice.

37. With respect to Distributions in the Book Entry Certificate System, the Issuer makes all payments directly to Cede & Co. by wire transfer of funds to Cede & Co.'s account at the New York Federal Reserve Bank. Thereafter, the respective interests of DTC Participants are paid as reflected on the books and records of DTC. The beneficial ownership interest of each of the Participants' Customers are paid according to the books and records of the DTC Participants and their branch offices. Thus, as is the case with Physical Certificates, at least three (3) distinct sets of books and records are maintained in connection with Book Entry Certificates, those of the Issuer, of DTC, and of the DTC Participants and their branch offices. Each reflects a different Record Owner.

38. The foregoing describes how most of the Excess Receipts or unclaimed property that is the subject of this lawsuit came into existence. Generally, such Excess Receipts consist of money. However, such property can and does also include Physical Certificates registered to Cede & Co. that are held at DTC.

IX.

PLAINTIFF IN INTERVENTION'S ANALYSIS OF RIGHTS AND RELATIONSHIPS

39. As previously stated, DTC and DTC Participants are Intermediaries functioning as agents of both the Issuer and the Beneficial Owner. Neither DTC nor DTC Participants have claimed any legal ownership interest to the Excess Receipts at issue herein. The brokerage firms cannot reasonably or legally be characterized as either creditors or debtors. Moreover, it makes no sense to analyze rights on the basis of who is the "Record Owner" of the securities or of the Distributions, since the identity of the "Record Owner" varies depending on whose records are being examined.

40. The declaration of a dividend or principal and interest payments basically represents a debt between the Issuer and the Beneficial Owner. The Beneficial Owner is in fact the creditor and the Issuer the debtor. It makes no difference for purposes of legal analysis in this case that the Beneficial Owner may have been paid the Distribution, because all of these Excess Receipts are simple accounting errors occurring on at least three (3) different sets of books and records. All Excess Receipts arise in the context of the chain of transactions between the debtor-Issuer and creditor-Beneficial Owner, and if the existence and location of the Beneficial Owner is unknown, the Excess Receipts, pursuant to *Texas v. New Jersey, supra*, should be remitted to the state of incorporation of the Issuer.

X.

SPECIFIC PROPERTY CLAIMED BY PLAINTIFF IN INTERVENTION

41. In its complaint, Delaware identifies fifteen DTC Participants incorporated in Delaware from which New York has either wrongfully taken or demanded the Excess Receipts at issue herein. One such brokerage firm identified is Dean Witter Reynolds, Inc. According to the actual Report of Abandoned Property filed by Dean Witter Reynolds, Inc. ("Dean Witter Report") with the New York Comptroller, Dean Witter Reynolds, Inc. turned over $354,737.02 to New York in 1982, along with 319 individual stock certificates, which amount represented abandoned property held by said firm at the close of business December 31, 1981. Of that amount, at least $1,478 represented moneys that were attributable to Issuers incorporated in the State of Texas. Texas now claims the right to take possession of such moneys. In addition Texas claims the right to any other Excess Receipts generated by Texas Issuers held or formerly held by the brokerage firms incorporated in the State of Delaware and remitted to or demanded by New York for the period 1978 through 1985.

42. While the amount turned over by Dean Witter Reynolds, Inc. and now claimed by Texas may seem small, it represents but one year of these Excess Receipts reported by a single brokerage firm. The amount of unclaimed property presently in issue in this litigation that Texas is entitled to claim is presently unknown, but is very substantial.

XI.

ADDITIONAL EXCESS RECEIPTS

43. In addition to claiming a portion of the Excess Receipts held or formerly held by the brokerage firms and demanded by or remitted to New York, Plaintiff in Intervention asserts a claim to certain Additional Excess Receipts demanded by or remitted to the State of New York which is not presently at issue in this case, but which should be considered by the Court. As will be described more fully in Parts XII and XIII, *infra*, the property consists of those Additional Excess Receipts held by DTC or its Nominee, Cede & Co. It also consists of Additional Excess Receipts which have arisen in connection with Distributions made by Governmental Issuers, which property is only now being demanded by New York pursuant to a recent statutory amendment.

44. Although Plaintiff in Intervention has diligently attempted to obtain sufficient information to calculate or even estimate the amount of Additional Excess Receipts, it has been unable to do so. Plaintiff in Intervention believes, however, that the amount of such Additional Excess Receipts greatly exceeds the amount of Excess Receipts presently in controversy. If this proceeding remains limited in scope to the Excess Receipts already in issue, it will be the proverbial case of the "tail wagging the dog".

XII.

ADDITIONAL EXCESS RECEIPTS HELD BY DTC

45. As evidenced by its 1987 Annual Report,[6] DTC holds huge amounts of Additional Excess Receipts. Plaintiff in Intervention has been denied access to the books and records of DTC, and therefore does not exactly know exactly how DTC comes to hold Additional Excess Receipts, or how much unclaimed property it has reported and remitted to New York. However, the explanation set forth in the letter of Ms. Patricia Trainer, Associate Counsel of DTC, to Ms. Anne Schwartz, General Counsel, Texas State Treasury Department, dated November 28, 1988, compels the conclusion that enormous amounts of Additional Excess Receipts are held by DTC. Further, the letter supports the conclusion that these Additional Excess Receipts come into existence and acquire their character as unclaimed property in the same basic manner as the Excess Receipts held by DTC Participants. A true and correct copy of said letter is attached to this Complaint as Exhibit "3".

46. DTC describes these Additional Excess Receipts as "Cede Float", which includes "payments on securities no longer on deposit" with DTC. The "Cede Float" occurs "after DTC transfers a securities certificate by endorsement, the transfer from DTC's nominee Cede & Co. is not reregistered on the books of the Issuer until a later time. Prior to reregistration, DTC may receive payments to Cede & Co. from the Issuer." Exhibit "3", p. 1.

---

[6]A copy of the 1987 Annual Report of the Depository Trust Corporation has been filed with the Court.

47. Any balance remaining in connection with a Distribution after all DTC Participants' have been paid is "assumed to be applicable to the float and is recorded in the 'Unclaimed Dividends Account'". Again, by DTC's own admission, the Additional Excess Receipts in the "Unclaimed Dividends Account" do not belong to DTC, but are merely held by DTC for the accounts of DTC Participants for the accounts of their Customers, the Beneficial Owners. Additional Excess Receipts remaining in the "Unclaimed Dividends Account" after three years are considered abandoned and are remitted by DTC to New York. Exhibit "3", p. 2.

48. DTC has refused to provide Plaintiff in Intervention with information sufficient to enable Plaintiff in Intervention to begin to estimate the amount of Additional Excess Receipts held by DTC attributable to Issuers incorporated in Texas. However, according to Exhibit "3", Additional Excess Receipts held by Cede & Co. and remitted to New York as abandoned property for a one-year period from January 1, 1985 to November, 1985, included at least $32,511 attributable to Texas Issuers.[7]

49. Plaintiff in Intervention claims the Additional Excess Receipts identified above and all

---

[7]This amount is attributable to only nine Issuers incorporated in Texas. In order to establish its claim in intervention to these Additional Excess Receipts, the Texas State Treasury Department sought to obtain copies of the Unclaimed Property Reports filed by DTC with the State of New York and were advised that copies of these Reports would not be released without subpoena. The Treasury then requested information regarding amounts of unclaimed property reported for any one year by DTC to New York attributable to the Issuers identified in the Dean Witter Report which were incorporated in the State of Texas. DTC agreed to provide only the information set forth in Exhibit "3". New York declined to provide any information.

Additional Excess Receipts held by DTC for the period 1978 through 1985 attributable to Issuers incorporated in the State of Texas. This claim is made for the same reason and on the same basis that Texas claims a portion of the funds already at issue in this litigation.

50. When Book Entry Certificates are issued, DTC is in direct contractual relationship with the Issuer and functions as the Issuer's Paying Agent and registrar. Thus, without regard to other claims, DTC is responsible as a Paying Agent under *Texas v. New Jersey, supra*. Paying Agents presently remit owner unknown Distributions to the state of incorporation.

XIII.

ADDITIONAL EXCESS RECEIPTS ATTRIBUTABLE TO GOVERNMENT ISSUES

51. The second type of Additional Excess Receipts results from bonds or debentures issued by Governmental or corporate Issuers. When the Issuer is a governmental entity, Distributions always arise in connection with municipal bonds issued to finance local governmental projects, and consist of principal and interest payments. They have never been reported or remitted to any state. They are now being demanded by New York. Pursuant to amendments to Section 300 of New York's Abandoned Property Law,[8] which became effective April 21, 1987, Distributions attributable to Governmental Issuers held on or after July 1, 1984, are now being demanded by New York if they have not been claimed at the expiration of three years. The New York amendments are set forth in

---

[8]New York Abandoned Property Law §300 (McKinney Supp. 1988).

Exhibit "B" attached to Plaintiff in Intervention's Brief in Support of Motion for Leave to File.

52. DTC and DTC Participants have never reported or remitted to any state these Additional Excess Receipts; instead, they have been lying fallow at DTC and at each and every DTC Participant. Until now, there has been no vehicle by which any state could claim and take possession of these Additional Excess Receipts paid into the Distribution System by each of the states' cities, counties and school districts.

53. Plaintiff in Intervention claims the right to take possession of Additional Excess Receipts held by DTC and all DTC Participants attributable to Texas Governmental Issuers for the period 1978 to 1985, the same period covered by this suit. With respect to the Additional Excess Receipts held by the DTC Participants, Plaintiff in Intervention claims that property for the same reason and on the same basis that it claims a portion of the funds already at issue in this litigation.

54. While the amount of its claim to Additional Excess Receipts held by DTC and any DTC Participants attributable to Texas Governmental Issuers is presently unknown, Plaintiff in Intervention estimates that amount may well be in the tens of millions of dollars.

XIV.

PROPRIETY OF CONSIDERING ADDITIONAL EXCESS RECEIPTS

55. Plaintiff in Intervention urges the Court to consider and determine the rights to claim the potentially huge amounts of Additional Excess Receipts described in Parts XI and XII above. The decision of

this Court with respect to the Excess Receipts already before it will conclusively and finally determine the rights of all states to take custodial possession of such Additional Excess Receipts. Such a final determination of rights should not be made without the Court's having first considered arguments which are relevant and peculiar to the Additional Excess Receipts. Inclusion of the Additional Excess Receipts will not broaden the issues or unduly complicate the pending litigation.

56. The Additional Excess Receipts were not initially made part of this litigation because neither Delaware nor New York had any incentive to include them. DTC is incorporated in the State of New York. All Additional Excess Receipts held by DTC would therefore be remitted to New York and all Excess Receipts held by DTC Participants would go to Delaware, under the theory urged in this litigation by Delaware. Under New York's theory of this litigation, New York would take all Additional Excess Receipts and Excess Receipts from both DTC and DTC Participants. By amending its statute, New York has also poised itself to seize all Additional Excess Receipts existing in the form of municipal bond Distributions.

XV.

MERITS OF CLAIM ASSERTED AND RESOLUTION URGED BY PLAINTIFF IN INTERVENTION

57. In *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both easy to administer and equitable. The resolution urged by Plaintiff in Intervention satisfies both criteria. It is easy to administer, since the identity of the Issuer is

always easily determined. Indeed, the identity of the Issuer is consistently known and reflected on all sets of books and records of all parties to the securities transactions. Moreover, all DTC Participants have regional or branch offices located in every state. These branch offices already maintain a separate set of books and records for local Customers evidencing their local Customers' ownership interests and Distribution receipts. Each branch/regional office also maintains its own bank account, and is individually accountable for year-end profit and loss statements to its New York headquarters. Presently, each branch office also maintains its own "Suspense Accounts" for unclaimed Distributions. These unclaimed funds are returned to their New York headquarters and are then remitted by the DTC Participant to New York. Thus transaction records already exist on a state-by-state basis.

58. The resolution proposed by Plaintiff in Intervention is also by far the most equitable method of distributing the unclaimed property at issue in this lawsuit.[9] This is particularly true with respect to the Additional Excess Receipts consisting of municipal bond Distributions. It is outrageous that moneys held by DTC Participants attributable to the State of Texas and its political subdivisions might be remitted to New York, or any state, other than the State of Texas. It is also particularly egregious that the Additional Excess Receipts held by DTC, which clearly functions merely as a Paying Agent or registrar in these transactions, are being demanded by and will be, without this Court's intervention, remitted to New York.

59. Excess Receipts can legitimately be characterized as nothing more than "distribution slop",

---

[9]A number of States have informally expressed an interest in supporting Plaintiff in Intervention.

created by poor accounting practices and record keeping error and attributable in part to the inadequate training given to people responsible for the accounting and the maintenance of books and records. Excess Receipts truly constitute unclaimed property for which no Beneficial Owner or other person with any legal entitlement thereto is ever likely to appear. To determine the rights of various states to claim such Excess Receipts on the basis of the arguments urged by either Delaware or New York will, in essence, elevate form over substance. The respective resolutions sought by both Plaintiff and Defendant are not compelled by, or consistent with, a strict interpretation of legal precedent. Most importantly, however, both such resolutions are simply unfair.

WHEREFORE, Plaintiff in Intervention prays:

1. That Plaintiff in Intervention be allowed to intervene herein;

2. That Additional Excess Receipts held by the Depository Trust Company and demanded by or remitted to New York for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

3. That Additional Excess Receipts attributable to Governmental Issuers held by the Depository Trust Company and all DTC Participants for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

4. That the temporary injunction sought by Delaware with respect to the Excess Receipts already at issue herein be extended, for the reasons stated in the Complaint of Delaware, to restrain New York from demanding or taking possession of all Excess Receipts

attributable to Issuers incorporated in the State of Texas or to Texas Governmental Issuers;

5. That Defendant New York be restrained and enjoined from collecting any Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Texas or attributable to Texas Governmental Issuers, and from expending any sums collected but presently unspent, consisting of such Excess Receipts and Additional Excess Receipts, until such time as this controversy is resolved;

6. That judgment be entered that the Excess Receipts and Additional Excess Receipts held by DTC and DTC Participants attributable to Issuers incorporated in the State of Texas or to Texas Governmental Issuers is subject only to the claims of the State of Texas under the Texas Property Code;

7. That New York be directed to pay or deliver to Plaintiff in Intervention all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code;

8. That Plaintiff in Intervention be granted such other and further relief as this Court deems just.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

_____

MARY F. KELLER
First Assistant Attorney General
Counsel of Record

SARAH J. SHIRLEY
Assistant Attorney General
Chief, Finance Division

P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2018

OF COUNSEL:

PROFESSOR ROBERT HAMILTON
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

PROFESSOR CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

ANNE L. SCHWARTZ
General Counsel
Texas State Treasury Department
L.B.J. State Office Building
(512) 463-5971

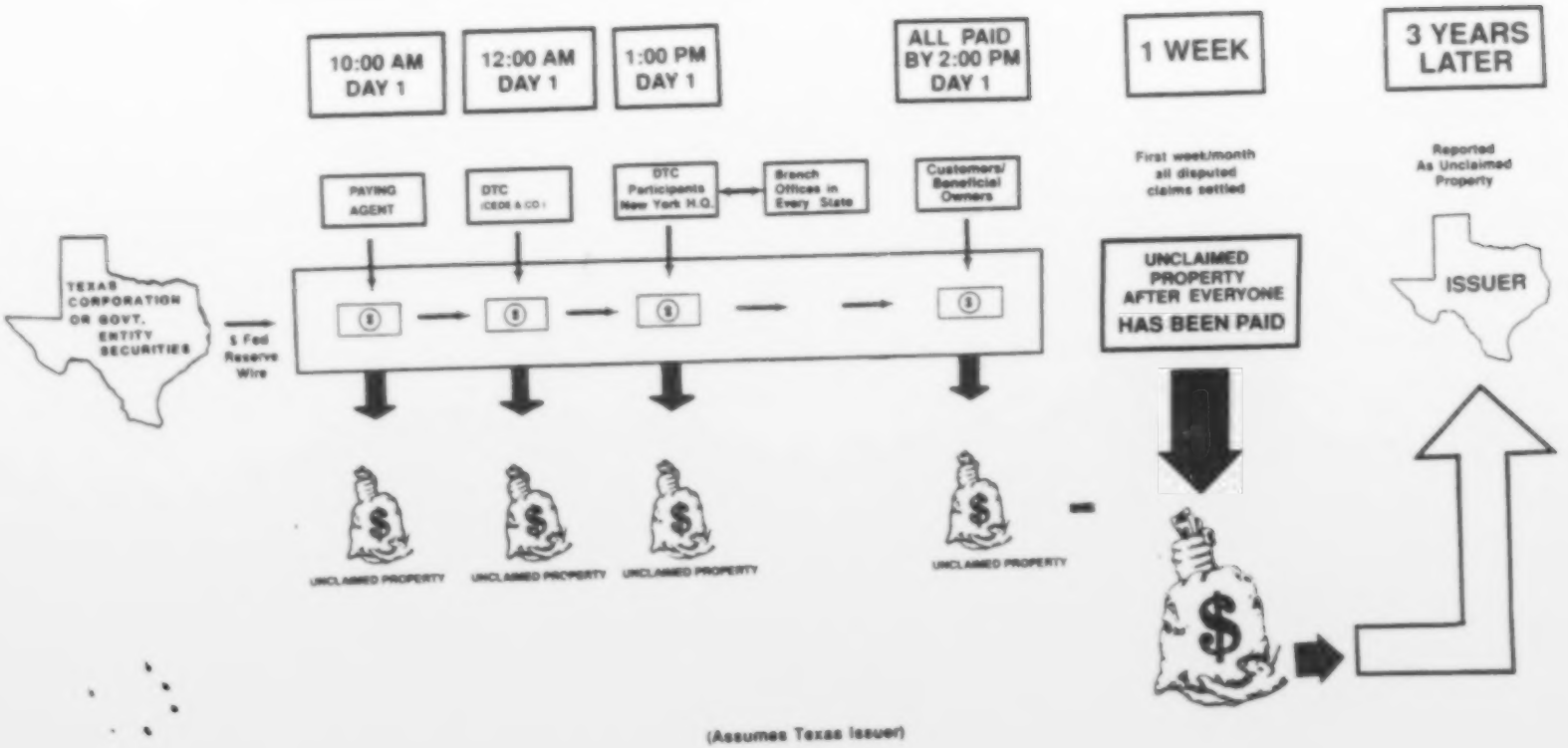
ATTORNEYS FOR THE STATE OF TEXAS

January 6, 1989

COMPLAINT IN INTERVENTION

EXHIBIT 1

PAYMENT FLOWCHART

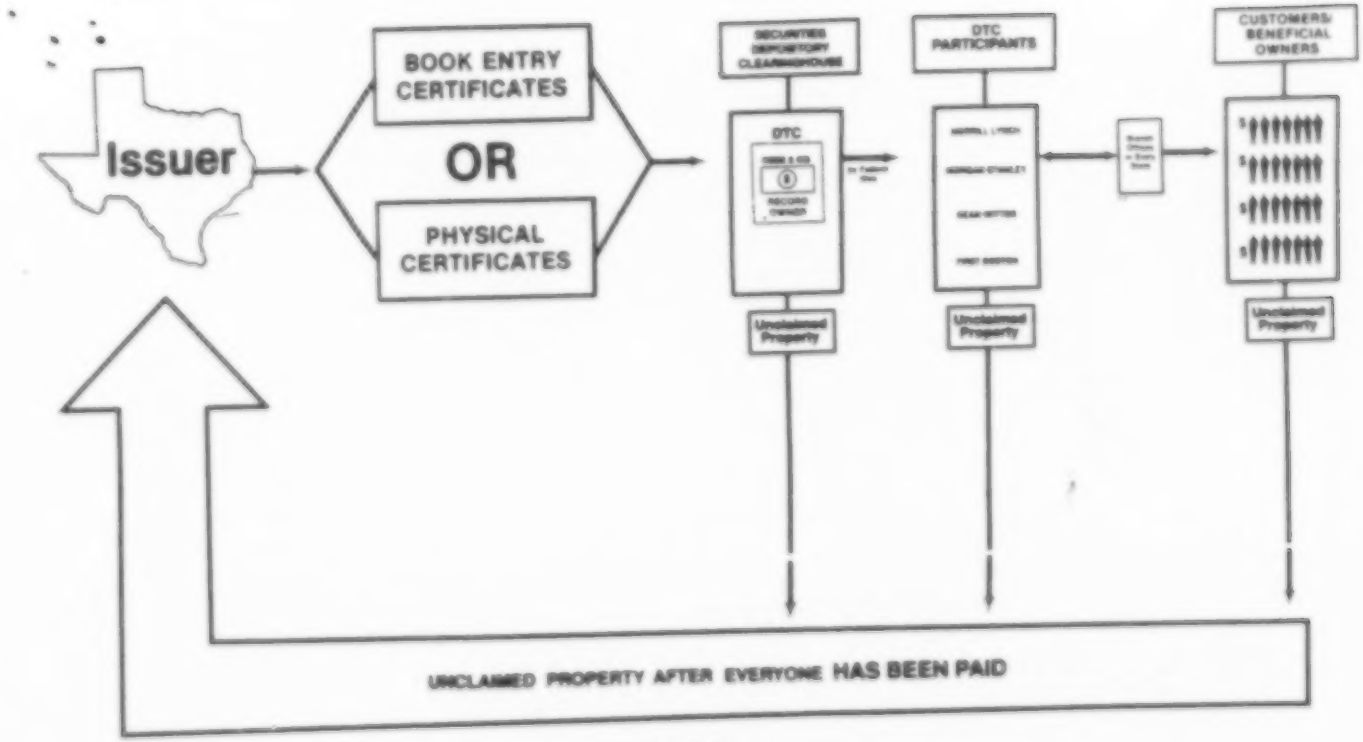


(Assumes Texas Issuer)

COMPLAINT IN INTERVENTION

EXHIBIT 2

THE DISTRIBUTION SYSTEM AND UNCLAIMED PROPERTY



COMPLAINT IN INTERVENTION

EXHIBIT 3

THE DEPOSITORY TRUST COMPANY
55 WATER STREET
NEW YORK, N.Y. 10041

PATRICIA H. TRAINOR
ASSOCIATE COUNSEL

November 28, 1988

BY TELECOPIER AND
FIRST CLASS MAIL

Ann L. Schwartz, Esq.
General Counsel
State of Texas Treasury Department
P.O. Box 12608 Capitol Station
Austin, TX 78711

Dear Ms. Schwartz:

This responds to your request for certain information about The Depository Trust Company ("DTC").

DTC is a registered securities depository engaged in the business of accepting eligible securities issues for deposit for the purpose of effecting book-entry transfers and pledges of such issues, at the direction of its Participants (which are broker-dealers, banks and other financial institutions), and performing certain related functions, including the collection and disbursement to Participants of dividends, interest and principal payments on securities in DTC's custody. DTC, a limited purpose trust company organized under the Banking Law of the State of New York and a member of the Federal Reserve System, is a "clearing corporation" within the meaning of Article 8 of the Uniform Commercial Code (which authorizes book-

entry transactions) and is a clearing agency registered pursuant to the provisions of Section 17A of the Securities Exchange Act of 1934, as amended.

To protect DTC and facilitate subsequent transfers, certificates for registered issues deposited with DTC are transferred into the name of Cede & Co., a New York partnership which is the nominee of DTC. Neither DTC nor Cede & Co. has any beneficial interest in the issues deposited with DTC. Because the securities are registered in the name of Cede & Co., DTC is the first recipient of distributions paid on these securities. Each distribution includes payments on securities still in DTC's custody on record date and may include payments on securities no longer on deposit that are known as the "Cede float." "Cede float" exists in most issues. It occurs when, after DTC transfers a securities certificate from its custody by endorsement, the transfer from DTC's nominee Cede & Co. is not registered on the books of the issuer until a later time. Prior to the re-registration, DTC may receive payments to Cede & Co. from the issuer.

After Cede & Co. pays all Participants who DTC accounts were credited with securities in DTC's custody on the record date, any remaining balance is assumed to be applicable to the Cede float. That balance is therefore recorded in a "Unclaimed Dividends" account. The property belongs, not to DTC, but to the unknown beneficial (not record) owner on the record date. DTC subsequently honors claims made by the beneficial owner or its representative. Pursuant to the Abandoned Property Law of the State of New York, after three years distributions remaining in the Unclaimed Dividends account that are deemed abandoned escheat and are sent by DTC to the Comptroller of the State of New York. Tardy claimants coming forward after escheatment are entitled by law

to recover distributions on valid claims (or proceeds of sale in the case of stock distributions) from New York State.

Certain DTC Participants are incorporated in the State of Texas. Certain issuers whose securities are eligible for deposit at DTC are believed by us to be incorporated in the State of Texas. At your request we have determined from our files that distributions paid to Cede & Co. by the following corporations you identified as Texas corporations were escheated by us to the State of New York as abandoned property in November, 1985, in the amounts shown:

Issuer	CUSIP Number	Amount Escheated 1985
Church's Fried Chicken	171583107	2,698.08
Enserch Corp.	293567103	1,245.08
Gulf States Utilities	402550107	11,206.00
Houston Natural Gas	442272100	15,208.58
Keystone International Inc.	493503106	206.40
Justin Industries Inc.	482171107	76.50
Moran Energy	616457101	247.76
National BancShares Group (Corp)	632593109	486.36
Pioneer Corporation	723645107	1,139.24

We trust the above information will be of assistance to you. If you have any further questions, please do not hesitate to call me at (212) 898-3230.

Very truly yours,

s/Patricia Trainer

PHT/vs

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

V.

STATE OF NEW YORK, Defendant

* * *

BRIEF OF THE STATE OF TEXAS IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

* * *

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 54

SPECIFICATION OF POINTS 56

ARGUMENT

1. INTERVENTION IS PROPER BECAUSE TEXAS HAS SATISFIED THE REQUIREMENTS FOR INTERVENTION SET FORTH IN RULE 24(b)(2), FEDERAL RULES OF CIVIL PROCEDURE, AND IS THEREFORE ENTITLED TO INTERVENE AS A MATTER OF RIGHT 56

2. PERMISSIVE INTERVENTION IS APPROPRIATE IN THIS CASE PURSUANT TO RULE 24(b), FEDERAL RULES OF CIVIL PROCEDURE 59

3. INTERVENTION IS PROPER UNDER THE PRINCIPLES ESTABLISHED IN WESTERN UNION TELEGRAPH COMPANY v. PENNSYLVANIA AND TEXAS v. NEW JERSEY 62

CONCLUSION 63

TABLE OF AUTHORITIES

Page

Pennsylvania v. New York, 407 U.S. 206 (1972) . . . . . *passim*

Texas v. New Jersey, 379 U.S. 674 (1965) . . . . . *passim*

Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 56,62,63

STATE STATUTES

Texas Property Code, Chap. 72 et seq. 55

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. Pro. 24(a)(2) 56,57

Fed. R. Civ. Pro. 24(b) 56,59,62

Fed. R. Civ. Pro. 24 (b) (2) 56

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Applicant for Intervention

V.

STATE OF NEW YORK, Defendant

* * *

BRIEF OF THE STATE OF TEXAS IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property. Applicant State of Texas ("Texas") seeks leave to intervene so that Texas can assert its claim to a portion of this unclaimed property, and to additional unclaimed property which should rightfully be considered by the Court in connection with this lawsuit.

I.

STATEMENT OF THE CASE

The State of Texas has filed its Complaint in Intervention ("Complaint"). The Complaint fully sets forth the entitlement of Texas to the unclaimed property at issue referred to by Texas as "Excess Receipts". These Excess Receipts consist of Distributions[10] received by brokerage firms incorporated in Delaware. There is no known owner entitled to claim these Excess Receipts. They remain in "Suspense Accounts" at the brokerage firm for three years, and thereafter are currently being remitted to New York.

Delaware and New York assert conflicting claims to these Excess Receipts. Both base their respective claims on the rulings of this Court in *Texas v. New Jersey*, 379 U.S. 674 (1965) and *Pennsylvania v. New York*, 407 U.S. 206 (1972). These cases establish the principle that unclaimed property is remittable to the state of the last known address of its owner. If that address is unknown, the property is to be remitted to the state of incorporation of the debtor. Delaware argues that Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firm holding such funds since the identity of the Beneficial Owner of the Excess Receipts is unknown. New York contends that the Excess Receipts should be returned to that state, for the reason that the Excess Receipts are owed to other brokerage firms, and most brokerage firms have New York trading addresses.

---

[10]In the Complaint, Texas has defined certain terms. Those definitions, which are also employed in the Brief, are incorporated herein by reference.

Texas also claims a portion of these same Excess Receipts under the holding of this Court in *Texas v. New Jersey, supra*, and *Pennsylvania v. New York, supra*, because the Excess Receipts constitute a debt of the Issuer owed to the securities' Beneficial Owner. If the identity and location of the Beneficial Owner are unknown, the state of incorporation of the Issuer is entitled to collect the Excess Receipts under that state's unclaimed property law. Under this theory, Distributions generated by Texas Issuers whose Beneficial Owners are unknown should be returned to the State of Texas.

Texas asserts its claim pursuant to Chapter 72, Tex. Prop. Code Ann. 72.001, *et seq.* (Vernon Supp. 1989), ("Texas Property Code") which provides for the custodial taking of abandoned or unclaimed tangible or intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been asserted within the applicable dormancy period, which for most types of personal property is three years.[11] A copy of Chapter 72 *et seq.* of the Texas Property Code is attached hereto as Exhibit "A".

---

[11]Since 1962, the State of Texas has provided by statute that the State shall take custodial possession of unclaimed or abandoned property of unknown owners. Chapter 72 of the Property Code, repealed and replaced Tex.Rev.Civ.Stat.Ann. art. 3272a (Vernon 1981).

II.

SPECIFICATION OF POINTS

1. INTERVENTION IS PROPER BECAUSE TEXAS HAS SATISFIED THE REQUIREMENTS FOR INTERVENTION SET FORTH IN RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE, AND IS THEREFORE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

2. PERMISSIVE INTERVENTION IS APPROPRIATE IN THIS CASE PURSUANT TO RULE 24(b), FEDERAL RULES OF CIVIL PROCEDURE.

3. INTERVENTION IS PROPER UNDER THE PRINCIPLES ESTABLISHED BY THIS COURT IN *WESTERN UNION TELEGRAPH COMPANY v. PENNSYLVANIA* AND *TEXAS v. NEW JERSEY*.

ARGUMENT

1. INTERVENTION IS PROPER BECAUSE TEXAS HAS SATISFIED THE REQUIREMENTS FOR INTERVENTION SET FORTH IN RULE 24(b)(2), FEDERAL RULES OF CIVIL PROCEDURE, AND IS THEREFORE ENTITLED TO INTERVENE AS A MATTER OF RIGHT.

Rule 9.2 of the Supreme Court directs that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions." Where a non-party seeks to intervene in an original action, the standards governing the propriety of intervention are found in Rule 24, Fed. R. Civ. Pro.

Pursuant to Rule 24(a)(2), Fed. R. Civ. Pro., anyone who timely applies shall be permitted to intervene in the action:

> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

By this intervention, Texas claims a portion of the specific unclaimed property or Excess Receipts which constitute the subject matter of this action. As stated in its Complaint, the efforts of Texas to secure information from New York and various brokerage firms regarding the amounts and sources of unclaimed property remitted to New York have met considerable resistance. Texas has, however, succeeded in obtaining the Dean Witter Report for the year ending December 31, 1981. This report reflects the payment to New York by Dean Witter Reynolds, Inc. of at least $1,478.00 attributable to Issuers incorporated in the State of Texas. If one adds to this amount the Excess Receipts attributable to Texas Issuers remitted to New York by all brokerage firms incorporated in Delaware for the years 1978 through 1985, the total amount of Excess

Receipts presently claimed by Texas, while presently unknown, is substantial and sufficient to establish the propriety of Texas' intervention as a matter of right.

Even before adoption of Rule 9.2, this Court allowed states to intervene in unclaimed property suits when they were claiming an interest in the property that was the subject of the controversy. The State of Florida was permitted to intervene in *Texas v. New Jersey, supra*, on a claim that it had the right to escheat or take possession of a portion of the property involved therein. Illinois was denied intervention in *Texas v. New Jersey, supra*, for the reason that, unlike Florida in that case and Texas here, Illinois claimed no interest in the property which was the subject of the litigation.

The right of Texas to claim and take possession of these Excess Receipts will be conclusively determined by the Court's decision in this proceeding. If the argument of either of the existing parties is accepted, Texas will be forever precluded from claiming or taking custodial possession of unclaimed property of this nature. The claim asserted by Texas is in direct conflict with the claims of Delaware and New York. Under the resolution proposed by Texas, each of the fifty states, rather than just Delaware or New York, will have an opportunity to share in the allocation of Excess Receipts. Such resolution will inevitably reduce the amount of Excess Receipts subject to the claims of the existing parties. Neither Delaware nor New York, therefore, has any incentive to advocate the claim urged by Texas. Clearly, the interests of Texas are not adequately represented by the existing parties.

Texas respectfully submits that the standards for determining whether Texas can intervene as a matter of right in this case have been satisfied.

2. PERMISSIVE INTERVENTION IS APPROPRIATE IN THIS CASE PURSUANT TO RULE 24(b), FEDERAL RULES OF CIVIL PROCEDURE.

Alternatively, Texas urges the Court to exercise its discretion to allow permissive intervention in favor of Texas pursuant to Rule 24(b), Fed. R. Civ. Pro. Permissive intervention is appropriate because, without the intervention of Texas, matters involving issues of fact and law common to those presently in this lawsuit, and involving potentially hundreds of millions of dollars, will of necessity be decided by implication. There will be no complete presentation of the issues, but rather a microscopic misfocus on one small piece of the Distribution System puzzle. There is simply too much at stake for the Court to allow this to occur.

As detailed in the proposed Complaint in Intervention, Texas seeks to have this Court consider, as subject property in this lawsuit, certain Additional Excess Receipts. These Additional Excess Receipts consist of: (a) excess receipts presently being remitted to New York which are held by the Depository Trust Company; and (b) excess receipts arising from unclaimed principal and interest payments on corporate and governmental issuer's bonds which have never in the past been remitted to any state, but which are now claimed by New York pursuant to recent amendments to §300 of the New York Unclaimed Property Laws. A copy of the amendments is attached hereto as Exhibit "B". The amount of the Additional Excess Receipts Texas seeks to bring into this lawsuit greatly exceeds the amount of Excess Receipts presently in controversy. If the Additional Excess Receipts are considered, the amount Texas, and other states, may claim may run into the hundreds of millions of dollars.

The Court's decision regarding disposition of the Additional Excess Receipts will require an analysis of law and facts which already are, or will inevitably be, before the Court. The Additional Excess Receipts come into existence and acquire their character in the exact same manner as the Excess Receipts already under consideration. Unclaimed property arises each time money or securities pass through each Intermediary in the Distribution System. As Exhibit "3" to Texas' Complaint in Intervention demonstrates, the unclaimed property is exactly the same whether the Intermediary is DTC or Dean Witter. Moreover, the unclaimed property is the same, whether it arises in connection with equity or debt transactions. One-half of Wall Street is the stock market, and the other half, the bond market. Inclusion of the Additional Excess Receipts therefore merely brings into this lawsuit one more Intermediary, and the second half of the securities industry. Clearly, Texas claims a portion of the Additional Excess Receipts for the same reason and on the same legal and factual basis that it claims a portion of the Excess Receipts already at issue.

The principal authorities relied upon by Texas, Delaware and New York in support of all claims are identical. Each state correctly cites *Texas v. New Jersey, supra*, and *Pennsylvania v. New York, supra*, as the controlling precedent, and argues that the principles of law established in those cases compel the result urged by each. All three theories are arguably consistent with these prior rulings, depending upon how the law set forth therein is interpreted and applied to the facts of this case.

Additionally, the facts which Texas will develop in order to support its claim are either already before the Court or will inevitably be developed during the course of these proceedings. Delaware and New York have each offered a narrow, piecemeal description of

the Distribution System out of which Excess Receipts arise. As a result, the existing parties have presented the issues in an unrealistically limited, and perhaps misleading, manner. New York and Delaware are disinclined to broaden this picture because Wall Street and DTC are located in New York, and most brokerage firms in the United States are incorporated in Delaware. Nevertheless, the Court must analyze all the facts detailed in Texas' Complaint in Intervention in order to meaningfully address the proper allocation of unclaimed Distributions and resolve that issue in a manner that is fair, equitable and otherwise consistent with *Texas v. New Jersey, supra*, and *Pennsylvania v. New York, supra*. Clearly, the claim of Texas to both the Excess Receipts and the Additional Excess Receipts involve questions of law and fact common to those already present in this litigation. Intervention by Texas will therefore not unduly delay or prejudice the adjudication of the rights of the original parties.

The right of Texas to claim and take custodial possession of the Excess Receipts will be conclusively determined by the Court's ruling in this case whether or not Texas is permitted to intervene. The disposition of the Additional Excess Receipts will be similarly determined, even if the Court does not specifically address the Additional Receipts or permit the requested Intervention. However, if Texas is not permitted to intervene and assert its claim, the likelihood is great that development of the facts, the law, and the analysis of same will be incomplete and artificial. Texas urges the Court to resist the temptation to allow rights of this magnitude, involving hundreds of millions of dollars, to be decided by implication without the benefit of the strong advocacy of all parties with an interest in or claim to the property.

Pursuant to Rule 24(b), Fed. R. Civ. Pro., the Court may exercise its discretion and allow permissive intervention if an applicant's claim involves issues of fact or law common to those already present in the litigation and the intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties. Texas respectfully submits that the criteria set forth in this Rule have been satisfied in this case, and that the requested intervention should be allowed.

3. INTERVENTION IS PROPER UNDER THE PRINCIPLES ESTABLISHED IN *WESTERN UNION TELEGRAPH COMPANY v. PENNSYLVANIA* AND *TEXAS v. NEW JERSEY.*

In *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), the Court recognized the difficulties inherent in resolving controversies among different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. Texas seeks by this Intervention an opportunity to so present its claim.

In *Texas v. New Jersey, supra*, the Court expressed its commitment to resolving unclaimed property controversies in a manner that is both easy to administer and equitable, and adopted a rule that would "tend to distribute escheats among the states in proportion to the commercial activities of their residents." *Id.* at 681.

The resolutions proposed by Delaware and New York are wholly at odds with the public policy

established by the Court. The practical result of the formulae suggested will be to reward either New York for the fact that Wall Street is located in New York City and most brokerage firms have trading addresses there, or Delaware for the tax incentives it provides which have caused many corporations, and most brokerage firms, to incorporate in that state.

The solution proposed by Texas, on the other hand, recognizes the commercial activities of the states themselves and their political subdivisions, and of their corporate citizens, and apportions the Excess Receipts and Additional Excess Receipts according to such activities. It allows all fifty states to claim their pro rata shares of unclaimed property put into the Distribution System by their corporate and Governmental Issuers. Unclaimed Additional Excess Receipts generated by political subdivisions such as the Austin Independent School District and the City of Houston should be returned to Texas, whose taxpayers paid off the indebtedness, rather than New York or Delaware. Absent intervention by Texas, however, there will be no party before the Court to advocate such a resolution. Texas respectfully submits that intervention in this suit by Texas is appropriate, under the principles of law established in *Western Union Telegraph Company v. Pennsylvania, supra*, and *Texas v. New Jersey, supra*.

III.

CONCLUSION

For the reasons stated, the Motion of the State of Texas for Leave to Intervene as Plaintiff should be granted.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant
Of Counsel

SARAH J. SHIRLEY
Assistant Attorney General
Chief, Finance Division
State Bar No. 18278400
P.O. Box 12548, Capitol Station
Austin, Texas 78711
(512) 463-2018

OF COUNSEL:

PROFESSOR CHARLES ALAN WRIGHT
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

PROFESSOR ROBERT HAMILTON
727 East 26th Street
Austin, Texas 78705
(512) 471-5151

ANNE L. SCHWARTZ
General Counsel
Texas State Treasury Department
L.B.J. State Office Building
Austin, Texas 78711
(512) 463-5971

BRIEF OF THE STATE OF TEXAS IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

EXHIBIT A

INDEX TO PROPERTY CODE

As Amended by S.B. 581, 70th Legislature, Regular Session 1987

Effective September 1, 1987

TITLE 6. UNCLAIMED PROPERTY

CHAPTER 71. ESCHEAT OF PROPERTY

SUBCHAPTER A. GENERAL PROVISIONS

Section		Page
71.001.	Escheat	71
71.002.	Presumption of Death	71
71.003.	Presumption of Intestacy	71
71.004.	Presumption of Death Without Heirs	72
71.005.	Act of Ownership	72
71.006.	Review of Probate Decree	72

SUBCHAPTER B. ESCHEAT PROVISIONS

71.101.	Petition for Escheat	73
71.102.	Citation	74
71.103.	Party to Proceeding	74
71.104.	Appearance of Claimants	75
71.105.	Trial	75
71.106.	Default Judgment	76
71.107.	Judgment for State	76
71.108.	Costs Paid by State	78
71.109.	Appeal; Writ of Error	78

SUBCHAPTER C. DISPOSITION OF ESCHEATED PROPERTY

71.201.	Seizure and Sale of Personal Property	78

71.202. Disposition of Real Property 79
71.203. Account of Escheated Property 80

SUBCHAPTER D. RECOVERY OF ESCHEATED PROPERTY

71.301. Suit for Escheated Personal Property 80
71.302. Recovery of Personal Property 81
71.303. Suit for Escheated Real Property 81
71.304. State as Party in Suit for Assets 81

CHAPTER 72. ABANDONMENT OF PERSONAL PROPERTY

SUBCHAPTER A. GENERAL PROVISIONS

72.001. Application of Chapter 82

SUBCHAPTER B. PRESUMPTION OF ABANDONMENT

72.101. Personal Property Presumed Abandoned 85
72.102. Traveler's Check and Money Order 88
72.103. Preservation of Property 89

CHAPTER 73. INACTIVE ACCOUNTS HELD BY BANKING ORGANIZATIONS

SUBCHAPTER A. GENERAL PROVISIONS

73.001. Definitions and Application of Chapter 90
73.002. Depository 91
73.003. Preservation of Inactive Account or Deposit Box 91

SUBCHAPTER B. PRESUMPTION OF INACTIVITY

73.101.	Account or Safe Deposit Box Presumed Inactive	92

CHAPTER 74. REPORT, DELIVERY, AND CLAIMS PROCESS

SUBCHAPTER A. APPLICABILITY

74.001.	Applicability	93

SUBCHAPTER B. PROPERTY REPORT

74.101.	Property Report	93
74.102.	Verification	95
74.103.	Retention of Records	96

SUBCHAPTER C. NOTICE

74.201.	Published Notice	97
74.202.	Notice for Item with Value Not Exceeding $50	98
74.203.	Notice to Owner	98
74.204.	Notice that Accounts are Subject to this Chapter	99
74.205.	Charge for Notice	100

SUBCHAPTER D. DELIVERY

74.301.	Delivery of Property to the State Treasurer	100
74.302.	Verification of Delivered Property	101
74.303.	Effect of Late Notice	102
74.304.	Responsibility after Delivery	103
74.305.	Suit to Compel Delivery	105

74.306.	Unclaimed Property Held by Federal Government	106
74.307.	List of Owners	106
74.308.	Period of Limitation Not a Bar	106
74.309.	Private Escheat Agreements Prohibited	107

SUBCHAPTER E. DISPOSITION OF DELIVERED PROPERTY

74.401.	Sale of Property	107
74.402.	Notice of Sale	108
74.403.	Purchaser's Title	108

SUBCHAPTER F. CLAIM FOR DELIVERED PROPERTY

74.501.	Filing of Claim	109
74.502.	Claim Filed with Depository	109
74.503.	Consideration of Claim	111
74.504.	Hearing	111
74.505.	Payment of Claim	111
74.506.	Appeal	112
74.507.	Fee for Recovery	113
74.508.	Claim of Another State to Recover Property; Procedure	113

SUBCHAPTER G. UNCLAIMED MONEY FUND

74.601.	Fund	115
74.602.	Use of Fund	116
74.603.	Audit; Appropriation	117

SUBCHAPTER H. ENFORCEMENT

74.701.	Rules	117
74.702.	Examination of Records	117
74.703.	Additional Personnel	118

74.704. Assistance in Enforcement 118
74.705. Interest, Attorney's Fees, and Penalties 118

CHAPTER 75. TEXAS MINERALS

SUBCHAPTER A. APPLICABILITY

75.001. Definitions; Application of Chapter 120

SUBCHAPTER B. PRESUMPTION OF ABANDONMENT

75.101. Presumption of Abandonment 122
75.102. Preservation of Property 122

Transitional Rule 123

Miscellaneous Provisions of S.B. 906 69th Legislature, Regular Session - 1985-Nat. Res. Code Ann., 91.403 (VERNON 1978) (Subsection (c) is new material) 124

PROPERTY CODE

CHAPTER 71. ESCHEAT OF PROPERTY

SUBCHAPTER A. GENERAL PROVISIONS

Section 71.001. Escheat

(a) If an individual dies intestate and without heirs, the real and personal property of that individual is subject to escheat.

(b) "Escheat" means the vesting of title to property in the state in an escheat proceeding under Subchapter B.

Section 71.002. Presumption of Death

An individual is presumed dead for the purpose of determining if the individual's real or personal property is subject to escheat if the individual:

(1) is absent from the individual's place of residence for seven years or longer; and

(2) is not known to exist.

Section 71.003. Presumption of Intestacy

An individual is presumed to have died intestate if, on or before the seventh anniversary of the date of the individual's death, the individual's will has not been recorded or probated in the county where the individual's property is located.

Section 71.004. Presumption of Death Without Heirs

An individual is presumed to have died leaving no heirs if for the seven-year period preceding the court's determination:

(1) a lawful claim to the individual's property has not been asserted; and

(2) a lawful act of ownership of the individual's property has not been exercised.

Section 71.005. Act of Ownership

For the purposes of this chapter, an individual exercises a lawful act of ownership in property by, personally or through an agent, paying taxes to this state on the property.

Section 71.006. Review of Probate Decree

(a) If the state claims that an estate that has been administered in probate court in this state is subject to escheat, the state may have the jugment of the probate court reviewed by filing a petition in district court alleging that the administration of the estate was obtained by fraud or mistake of fact.

(b) The case shall be tried in accordance with the law for the revision and correction of a decree of the probate court.

[Sections 71.007 to 71.100 reserved for expansion]

SUBCHAPTER B. ESCHEAT PROCEEDINGS

Section 71.101. Petition for Escheat

(a) If the attorney general or a district attorney, criminal district attorney, or county attorney is informed or has reason to believe that real or personal property is subject to escheat under this chapter, the attorney may file a sworn petition requesting the escheat of the property and requesting a writ of possession for the property.

(b) The petition must contain:

(1) a description of the property;

(2) the name of the deceased owner of the property;

(3) the name of the tenants or persons claiming the estate, if known; and

(4) the facts supporting the escheat of the estate.

(c) If the petition is filed by a person other than the attorney general, the person shall send to the attorney general written notice of the filing and a copy of the petition to permit the attorney general to elect to participate on behalf of the state.

(d) An action brought under this section is governed by the procedure relating to class actions provided by the Texas Rules of Civil Procedure.

(e) A petition filed under this section is not subject to an objection relating to misjoinder of parties or causes of action.

Section 71.102. Citation

(a) If a petition is filed under this subchapter, the district clerk shall issue citation as in other civil suits to:

(1) each defendant alleged by the petition to possess or claim the property that is the subject of the petition;

(2) any person required by this chapter to be cited; and

(3) persons interested in the estate.

(b) The citation required by Subdivision (3) of Subsection (a) must be published as required for other civil suits and must:

(1) briefly state the contents of the petition; and

(2) request all persons interested in the estate to appear and answer at the next term of the court.

Section 71.103. Party to Proceeding

(a) A person who exercises a lawful act of ownership in property that is the subject of an escheat must be made a party to the proceeding by:

(1) personal service of citation if the person is a resident of this state and the person's address can be obtained by reasonable diligence; or

(2) service of citation on a person's agent if the person is a nonresident or a resident who cannot be found and the agent can be found by the use of reasonable diligence.

(b) For the purposes of this section, reasonable diligence includes an inquiry and investigation of the records of the office of the tax assessor-collector of the county in which the property sought to be escheated is located.

Section 71.104. Appearance of Claimants

Any person, whether named in the escheat petition or not, who claims an interest in property that is the subject of an escheat proceeding may appear, enter a pleading, and oppose the facts stated in the petition.

Section 71.105. Trial

(a) If a person appears and denies the state's right to the property or opposes a material fact of the petition, the court shall try the issue as any other issue of fact.

(b) The court may order a survey as in other cases in which the title or the boundary of the land is in question.

Section 71.106. Default Judgment

If citation is issued in accordance with Section 71.102 and no person answers within the period provided by the Texas Rules of Civil Procedure, the court shall render a default judgment in favor of the state.

Section 71.107. Judgment for State

(a) If the court renders a judgment for the state finding that an intestate died without heirs, the property escheats to the state and title to the property is considered to pass to the state on the date of death of the owner as established by the escheat proceeding. The court may award court costs to the state.

(b) If the judgment involves real property, the state may sell the property under the general laws governing the sale of Permanent School Fund lands and, after the second anniversary of the date of the final judgment, the court shall issue a writ of possession of the property.

(c) If the judgment involves personal property, the court shall issue a writ of possession that contains an adequate description of the property as in other cases for recovery of personal property.

(d) When the record of the escheat proceeding reflects that a lienholder or his predecessor received actual or constructive notice of the escheat proceeding, the entry of the judgment in the escheat proceeding

will either satisfy or extinguish any lien which the lienholder or his predecessor claimed or could have claimed on the escheated property at the escheat proceeding.

(e) The sheriff, constable, court clerk, or other officer appointed by the judge in an escheat proceeding shall execute a writ of possession by filing the writ with the deed or map records of the county when the escheated property relates to realty and by serving the writ on any holder, tenant, or occupant of any escheated property. Additionally, the person who executes a writ of possession shall either:

(1) post the writ for at least three consecutive weeks on the door or posting board of the county courthouse in the county where the proceeding was conducted or in the county where the property is located; or

(2) in the case of real property, post the writ for at least two consecutive weeks at a reasonably conspicuous place on the realty; or

(3) publicize the writ in any other fashion ordered by the court.

(f) After validly executing a writ of possession, the sheriff, constable, court clerk, or other appointed officer shall note the method of the clerk to be filed in the court records of the escheat proceeding.

Section 71.108. Costs Paid by State

If the property does not escheat, the state shall pay court costs. The clerk of the court shall certify the amount of the costs, and when the certificate is filed in the office of the comptroller of public accounts, the comptroller shall issue a warrant for the amount of the costs.

Section 71.109. Appeal; Writ of Error

A party who appeared at an escheat proceeding may appeal the judgment rendered or may file an application for a writ of error on the judgment. The attorney general or other person acting on behalf of the state in the escheat proceeding may make an appeal or file the writ.

[Section 71.110 to 71.200 reserved for expansion]

SUBCHAPTER C. DISPOSITION OF ESCHEATED PROPERTY

Section 71.201. Seizure and Sale of Personal Property

(a) If personal property escheated to the state, the court shall issue to the sheriff a writ that commands the sheriff to seize the escheated property.

(b) The sheriff shall:

(1) dispose of the personal property at public auction in accordance with the law regarding the sale of personal property under execution; and

(2) deposit into the State Treasury the proceeds of the sale, less court costs.

Section 71.202. Disposition of Real Property

(a) Real property that escheats to the state under this title before January 1, 1985, becomes a part of the permanent school fund. Real property that escheats to the state on or after January 1, 1985, is held in trust by the Commissioner of the General Land Office for the use and benefit of the foundation school fund. The revenue from all leases, sales, and use of land held for the foundation school fund shall be deposited to the credit of the foundation school fund.

(b) Before the 91st day after the day on which a judgment that provides for the recovery of real property is rendered, the clerk of the district court rendering the judgment shall send to the Commissioner of the General Land Office:

(1) a certified copy of the judgment; and

(2) notice of any appeal of that judgment.

(c) The commissioner shall list real property as escheated foundation school fund land or permanent school land as appropriate when the commissioner receives:

(1) a certified copy of a judgment under which the property escheats to the

state and from which appeal is not taken; or

(2) a certified copy of notice of the affirmance on appeal of a judgment under which the property escheats to the state.

Section 71.203. Account of Escheated Property

The comptroller shall keep an account of the money paid to and real property vested in this state under this chapter.

[Sections 71.204 to 71.300 reserved for expansion]

SUBCHAPTER D. RECOVERY OF ESCHEATED PROPERTY

Section 71.301. Suit for Escheated Personal Property

(a) If personal property of a deceased owner escheats to the State under this chapter and is delivered to the state, a person who claims the property as an heir, devisee, or legatee of the deceased may file suit against the state in a district court of Travis County, Texas. The suit must be filed on or before the fourth anniversary of the date of the final judgment of the escheat proceeding.

(b) The petition must state the nature of the claim and request that the money be paid to the claimant.

(c) A copy of the petition shall be served on the attorney general not later than the

20th day preceding the return day of the process.

Section 71.302. Recovery of Personal Property

(a) If in a suit filed under Section 71.301 the court finds that a claimant is entitled to recover personal property, the court shall order the comptroller to issue a warrant for payment of the claim without interest or costs.

(b) A copy of the order under seal of the court is sufficient voucher for issuing the warrant.

Section 71.303. Suit for Escheated Real Property

(a) If real property escheats to the state under this chapter, a person who was not personally served with citation in the escheat proceedings may file suit for all or a part of the property. The suit must be filed not later than the second anniversary of the date of the final judgment in the escheat proceedings.

(b) To the extent the claimant is adjudged to be the owner of all or a part of the property, the state is divested of the property.

Section 71.304. State as Party in Suit for Assets

A suit brought for the collection of assets delivered to the State Treasurer under this chapter must be brought in the name of this state.

CHAPTER 72. ABANDONMENT OF PERSONAL PROPERTY

SUBCHAPTER A. GENERAL PROVISIONS

Section 72.001. Application of Chapter

(a) Tangible or intangible personal property is subject to this chapter if it is covered by Section 72.101 and;

(1) the last known address of the apparent owner, as shown on the records of the holder, is in this state;

(2) the records of the holder do not disclose the identity of the person entitled to the property, and it is established that the last known address of the person entitled to the property is in this state;

(3) the records of the holder do not disclose the last known address of the apparent owner, and it is established that:

(A) the last known address of the person entitled to the property is in this state; or

(B) the holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last known address of the

apparent owner or other person entitled to the property;

(4) the last known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide by law for the escheat or custodial taking of the property or is in a state in which the state's escheat or unclaimed property law is not applicable to the property, and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(5) the last known address of the apparent owner, as shown on the records of the holder, is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this state; or

(6) the transaction out of which the property arose occurred in this state; and

(A) the last known address of the apparent owner or other person entitled to the property is:

(i) unknown; or

(ii) in a state that does not provide by law for the escheat or custodial

taking of the property or in a state in which the state's escheat or unclaimed property law is not applicable to the property; and

(B) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or a state in which the state's escheat or unclaimed property law is not applicable to the property.

(b) This chapter supplements Chapter 71, and either chapter may be followed to the extend applicable.

(c) This chapter applies to property held by life insurance companies with the exception of unclaimed funds, as defined by Section 3, Article 4.08, Insurance Code, held by those companies that are subject to Article 408, Insurance Code.

(d) A holder of property presumed abandoned under this chapter is subject to the procedures of Chapter 74.

(e) In this chapter, a holder is a person, wherever organized or domiciled, who is:

(1) in possession of property that belongs to another;

(2) a trustee; or

(3) indebted to another on an obligation.

(f) In this chapter, a corporation shall be deemed to be a domiciliary of the state of its incorporation.

[Section 72.002-72.100 reserved for expansion]

SUBCHAPTER B. PRESUMPTION OF ABANDONMENT

Section 72.101. Personal Property Presumed Abandoned

(a) Except as provided by this section and Section 72.102, personal property is presumed abandoned, if for longer than three years:

(1) the existence and location of the owner of the property is unknown to the holder of the property; and

(2) according to the knowledge and records of the holder of the property, a claim to the property has not been asserted or an act of ownership of the property has not been exercised.

(b) Except as provided by Subsection (c), (d), and (f), stock or another intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, is presumed abandoned if:

(1) a dividend, distribution, or other sum payable as a result of the interest has remained unclaimed by the owner for five years and the owner within five years has not:

(A) communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest; or

(B) otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association prepared by the association or its agents; and

(2) the business association does not know the location of the owner at the end of the five-year period.

(c) At the expiration of a five-year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least five dividends, distributions, or other sums paid during the five-year period, the period leading to a presumption of abandonment, commences on the date that payment of the first unclaimed

dividend, distribution, or other sum became due and payable. If five dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been five dividends, distributions, or other sums that have not been claimed by the owner.

(d) The running of the five-year period of abandonment ceases immediately upon the occurrence of a communication referred to in Subsection (b). If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back to the time that dividend, distribution, or other sum became due and payable.

(e) At the time an interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously presumed abandoned, is presumed abandoned.

(f) Any stock or other intangible ownership interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the interest is subject to the presumption of abandonment as provided by Subsection (a), except that the applicable period of abandonment is five years.

Section 72.102. Traveler's Check and Money Order

(a) A traveler's check or money order is not presumed to be abandoned under this chapter unless:

(1) the records of the issuer of the check or money order indicate that it was purchased in this state;

(2) the issuer's principal place of business is in this state and the issuer's records do not indicate the state in which the check or money order was purchased; or

(3) the issuer's principal place of business is in this state, the issuer's records indicate that the check or money order was purchased in another state, and the laws of that state do not provide for the escheat or custodial taking of the check or money order.

(b) A traveler's check to which Subsection (a) applies is presumed to be abandoned on the latest of:

(1) the 15th anniversary of the date on which the check was issued;

(2) the 15th anniversary of the date on which the issuer of the check last received from the owner of the check written communication concerning the check; or

(3) the 15th anniversary of the date of the last writing, on file with the issuer, that indicate the owner's interest in the check.

(c) A money order to which Subsection (a) applies is presumed abandoned on the latest of:

(1) the fifth anniversary of the date on which the money order was issued;

(2) the fifth anniversary of the date on which the issuer of the money order last received from the owner of the money order written communication concerning the money order; or

(3) the fifth anniversary of the date of the last writing, on file with the issuer, that indicates the owner's interest in the money order.

Section 72.103. Preservation of Property

A holder of abandoned property shall preserve the property and may not by any procedure, including a deduction for service, maintenance, or other charge, transfer, convert, or reduce the property to the profits or assets of the holder.

CHAPTER 73. INACTIVE ACCOUNTS HELD BY BANKING ORGANIZATIONS

SUBCHAPTER A. GENERAL PROVISIONS

Section 73.001. Definitions and Application of Chapter

(a) In this chapter:

(1) "Account" means funds deposited with a depository in a checking, time, interest, or savings account.

(2) "Depositor" means a person who has an ownership interest in an account.

(3) "Owner" means a person who has an ownership interest in a safe deposit box.

(4) "Holder" means a depository.

(b) This chapter supplements Chapter 71, and either chapter may be followed to the extent applicable.

(c) Any property, other than an account or safe deposit box, held by a depository is subject to the abandonment provisions of Chapter 72.

(d) A holder of accounts or safe deposit boxes presumed inactive under this chapter is subject to the procedures of Chapter 74.

Section 73.002. Depository

For the purposes of this chapter, a depository is a bank, savings and loan association, or other banking organization that:

(1) receives and holds a deposit of money or the equivalent of money in banking practice or other personal property in this state; or

(2) receives and holds such a deposit or other personal property in another state for a person whose last known residence is in this state.

Section 73.003. Preservation of Inactive Account or Deposit Box

(a) A depository shall preserve an inactive account that is inactive, and the contents of a deposit box that is inactive. The depository may not by any procedure, including the imposition of a service charge, transfer, convert, or reduce such an account or the contents of such a box to the profits or assets of the depository.

(b) An account is inactive if for more than one year there has not been a debit or credit to the account because of an act by the depositor or an agent of the depositor, other than the depository. A safe deposit box is inactive if the rental on the box is delinquent for more than one year.

(c) This section does not affect the provisions of Article 6, Chapter IX, The Texas

Banking Code of 1943 (Article 342-906, Vernon's Texas Civil Statutes).

[Section 73.004-73.100 reserved for expansion]

SUBCHAPTER B. PRESUMPTION OF INACTIVITY

Section 73.101. Account or Safe Deposit Box Presumed Inactive.

(a) An account or safe deposit box is presumed inactive if:

(1) the account or safe deposit box has been inactive for at least five years;

(2) the location of the depositor of the account or owner of the safe deposit box is unknown to the depository; and

(3) the amount of the account or the contents of the box have not been delivered to the State Treasurer in accordance with Chapter 74.

(b) To satisfy the five-year period of inactivity required by subdivision (1) of Subsection (a), the account or safe deposit box must have been inactive for a continuous period beginning not later than June 30 of the fifth year preceding the year in which the report is filed under Chapter 74.

CHAPTER 74. REPORT, DELIVERY, AND CLAIMS PROCESS

SUBCHAPTER A. APPLICABILITY

Section 74.001. Applicability

This chapter applies to a holder of property that is presumed:

(1) abandoned under Chapter 72 or Chapter 75; or

(2) inactive under Chapter 73.

[Sections 74.002-74.100 reserved for expansion]

SUBCHAPTER B. PROPERTY REPORT

Section 74.101. Property Report

(a) Each holder, other than a life insurance company, who on June 30 of a year holds property that is presumed abandoned under Chapter 72 or Chapter 75 or inactive under Chapter 73 shall file a report of that property on or before November 1 of that year. A life insurance company that on December 31 of a year holds property that is presumed abandoned under Chapter 72 shall file a report of that property on or before May 1 of the following year. Each report shall be filed with the state treasurer as provided

by this section and on forms prescribed by the State Treasurer.[1]

(b) A holder required by Subsection (a) to file a report shall file a report each successive year regardless of whether the holder has any reportable property on June 30 of the year in which the report is filed.

(c) The property report must include:

(1) the name, if known, and the last known address, if any, of each person who, from the records of the holder of the property, appears to be the owner of the property, or the name and address, if known, of any person who is entitled to the property;

(2) a brief description of the property, the identification number, if any, and if appropriate, a balance of each account, except as provided by Subsection (e);

(3) the date that the property became payable, demandable, or returnable;

(4) the date of the last transaction with the owner concerning the property;

(5) any deduction made by the holder of the property for a service,

[1]See the transitional rule on page 123 for property reported to the State Treasurer but not delivered prior to the effective date of S.B. No. 906, 69th Legislature, Regular Session, 1985.

maintenance or other charge, unless fully restored and included in the amount reported; and

(6) other information that the state treasurer by rule requires to be disclosed as necessary for the administration of this chapter.

(d) Amounts due that individually are less than $25 shall be reported in the aggregate without furnishing any of the information required by Subsection (c).

Section 74.102. Verification

(a) The person preparing a property report shall place at the end of each copy of the report a verification made under oath and executed by:

(1) the individual holding the reported property;

(2) a partner, if the holder is a partnership;

(3) an officer, if the holder is an unincorporated association or a private corporation; or

(4) the chief fiscal officer, if the holder is a public corporation.

(b) The verification must include the following sentence:

"The foregoing report contains a full and complete list of all property held by the undersigned

that, from the knowledge and records of the undersigned, is abandoned under the laws of the State of Texas."

Section 74.103. Retention of Records

(a) A holder required to file a property report under Section 74.101 shall keep a record of:

(1) the name and last known address of each person who, from the records of the holder of the property, appears to be the owner of the property;

(2) a brief description of the property, including the identification number, if any; and

(3) the balance of each account, if appropriate.

(b) The record must be kept for 10 years from the date on which the property is reportable, regardless of whether the property is reported in the aggregate under Section 74.101.

(c) The state treasurer may by rule provide for a shorter period for keeping a record required by this section.

[Section 74.104-74.200 reserved for expansion]

SUBCHAPTER C. NOTICE

Section 74.201. Published Notice

(a) Except as provided by Subsection (b) and Subsection 74.202, the State Treasurer shall publish a notice in the newspaper of general circulation in March of the year immediately following the year in which the report required by Section 74.101 is filed. The notice must be published:

(1) in the county in which the last known address of a person required to be named in the notice is located; or

(2) if the address of a person listed is not set out in the report or if it is outside the state, in the county in which the holder of the abandoned property has its principal place of business, registered office, or agent for service in this state.

(b) The State Treasurer may use a method of publishing notice that is different from that prescribed by Subsection (a) (1) or (2) if the State Treasurer determines that the different method would be as likely as the prescribed method to give actual notice to the person required to be named in the notice.

(c) The published notice must state that the reported property is presumed abandoned and subject to this chapter and must contain:

(1) the name and city of last known address, if any, of each person listed in the property report filed under Section 74.101, listed alphabetically by name;

(2) A statement that, by addressing an inquiry to the State Treasurer, any person possessing an interest in the reported property may obtain information concerning the amount and description of the property and the name and address of the holder; and

(3) a statement that if the owner does not present proof of the claim to the holder and establish the owner's right to receive the property within the period provided by Section 74.301, the property will be delivered to the State Treasurer and that all claims made after that delivery must be sent to the State Treasurer.

Section 74.202. Notice for Item with Value not Exceeding $50

In the notice required by Section 74.201, the state treasurer is not required to publish information regarding an item having a value that is less than $50 unless the state treasurer determines that publication of that information is in the public interest.

Section 74.203. Notice to Owner

(a) During March of the year immediately following the year in which the report

required by Section 74.101 is filed, the state treasurer shall mail a notice to each person who has a Texas address and appears to be entitled to the reported property valued at $50 or more.

(b) The notice must contain:

(1) a statement that, according to a report filed with the state treasurer, property is being held to which the addressee appears to be entitled;

(2) the name and address of the person holding the property and any necessary information regarding changes of name and address of the holder; and

(3) a statement that if the owner does not present proof of the claim to the holder and establish the owner's right to receive the property within the period provided by Section 74.301, the property will be delivered to the state treasurer and that all claims made after that delivery must be sent to the state treasurer.

Section 74.204. Notice that Accounts are Subject to this Chapter

Publication of notice in accordance with Section 74.201 is notice to the owner by the holder and this state that the reported property is subject to this chapter.

Section 74.205. Charge for Notice

The state treasurer may charge the following against the property delivered under this chapter:

(1) expenses incurred for the publication of notice required by Section 74.201; and

(2) the amount paid in postage for the notice to owner required by Section 74.203.

[Sections 74.206-74.300 reserved for expansion]

SUBCHAPTER D. DELIVERY

Section 74.301. Delivery of Property to the State Treasurer

(a) If the owner of property for which notice is published does not establish the owner's right to the property within six months after the date on which the report is required to be filed by Section 74.101, then the holder of the property, other than a life insurance company, shall deliver the property to the state treasurer on or before May 1 of the year following the year in which the report is required to be filed. If the holder of the property is a life insurance company, the company shall deliver the property to the state treasurer on or before November 1 of the year in which the report is required to be filed.

(b) If the property subject to delivery under Subsection (a) is stock or some other intangible ownership interest in a

business association for which there is no evidence of ownership, the holder shall issue a duplicate certificate or other evidence of ownership to the state treasurer at the time delivery is required under this section.

(c) Instead of delivering to the state treasurer reported property for which publication of notice is required, the holder shall file with the state treasurer a verified written explanation of the proof of claim or the error in the presumption of abandonment or inactivity if:

(1) the owner establishes the owner's right to the property to the satisfaction of the holder of the property within six months after the date on which the report was filed; or

(2) it appears that for some other reason the presumption of abandonment is erroneous.

Section 74.302. Verification of delivered Property

(a) Property delivered under Section 74.301 must be accompanied by a verification under oath that:

(1) the property delivered is a complete and correct remittance of all accounts subject to this chapter in the holder's possession;

(2) the existence and location of the listed owners are unknown to the holder; and

(3) the listed owners have not asserted a claim or exercised an act of ownership with respect to the owner's reported property since the date on which the property report was filed.

(b) The verification in Subsection (a) shall be signed by:

(1) the individual holding the reported property;

(2) a partner, if the holder is a partnership;

(3) an officer, if the holder is an unincorporated association or a private corporation; or

(4) the chief fiscal officer, if the holder is a public corporation.

Section 74.303. Effect of Late Notice.

Failure of the state treasurer to give notice within the period prescribed by Section 74.201 or Section 74.203 does not affect:

(1) the owner's right to claim the property from the holder before it is delivered to the state treasurer; or

(2) the holder's duty to deliver the property to the state treasurer on the date specified by Section 74.301.

Section 74.304. Responsibility after Delivery

(a) If reported property is delivered to the state treasurer, the state shall assume custody of the property and responsibility for its safekeeping.

(b) A holder who delivers property to the state treasurer in good faith is relieved of all liability to the extent of the value of the property delivered for any claim then existing, that may arise after delivery to the state treasurer, or that may be made with respect to the property.

(c) If the holder delivers property to the state treasurer in good faith and, after delivery, a person claims the property from the holder or another state claims the property under its laws relating to escheat or unclaimed property, the attorney general shall, on written notice of the claim, defend the holder against the claim and the holder shall be indemnified from the unclaimed money fund established in Section 74.601 against any liability on the claim.

(d) The state treasurer is not, in the absence of negligence or mishandling of the property, liable to the person who claims the property for damages incurred while the property or the proceeds from the sale of the property are in the treasurer's

possession. But in any event the liability of the state is limited to the extent of the property delivered under this chapter and remaining in the possession of the state treasurer at the time a suit is filed.

(e) For the purposes of this section, payment or delivery is made in good faith if:

(1) payment or delivery was made in a reasonable attempt to comply with this chapter;

(2) the person delivering the property was not a fiduciary then in breach of trust with respect to the property and had a reasonable basis for believing based on the facts then known to the person that the property was abandoned or inactive for purposes of this chapter; and

(3) there is no showing that the records under which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(f) On delivery of a duplicate certificate or other evidence of ownership to the state treasurer under Subsection 74.301(b), the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate are relieved of all liability of every kind in accordance with this section to any person, including any person acquiring the original certificate or the duplicate of the certificate issued to

the state treasurer, for any losses or damages resulting to any person by the issuance and delivery to the state treasurer of the duplicate certificate.

Section 74.305. Suit to Compel Delivery

(a) If a holder fails to deliver property to the state treasurer in accordance with this subchapter, the attorney general shall bring an action in the name of this state on request of the state treasurer to compel the delivery of the property.

(b) Venue for a suit brought under this section is in a district court in Travis County, Texas.

(c) The fact that a suit seeks to compel delivery of property from more than one holder is not grounds for an objection concerning the misjoinder of parties or causes of action.

(d) In a suit filed under this section, the attorney general must show that the notice required by Sections 74.201 and 74.203 has been given. When introduced into evidence the verified property report, unless rebutted, is sufficient evidence that the property is abandoned and subject to delivery under this chapter and for entry of a judgment transferring custody of the property to the state treasurer.

Section 74.306. Unclaimed Property Held by Federal Government

(a) If the federal government enacts a law that provides for the discovery of unclaimed property held by the federal government and that provides or makes that information available to the states, the state treasurer may pay to the federal government from the unclaimed money fund the proportional share of the necessary cost of examining records.

(b) If the federal government delivers unclaimed property to the state treasurer, this state shall hold the federal government harmless from claims made by owners of the property after delivery.

Section 74.307. List of Owners

(a) The state treasurer shall compile and revise each year, except as to amounts reported in the aggregate, an alphabetical list of the names and last known addresses of the owners listed in the reports and the amount credited to each account.

(b) The state treasurer shall make the list available for public inspection during all reasonable business hours.

Section 74.308. Period of Limitation Not a Bar

The expiration, on or after September 1, 1987, of any period specified by contract, statute, or court order, during which an action or proceeding may be initiated

or enforced to obtain payment of a claim for money or recovery of property, does not prevent the money or property from being presumed abandoned property and does not affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the State Treasurer.

Section 74.309. Private Escheat Agreements Prohibited

An individual, corporation, business association, or other organization may not act through amendment of articles of incorporation, amendment of bylaws, private agreement, or any other means to take or divert funds or personal property into income, divide funds or personal property among locatable patrons or stockholders, or divert funds or personal property by any other method for the purpose of circumventing the unclaimed property process.

[Sections 74.310-74.400 reserved for expansion]

SUBCHAPTER E. DISPOSITION OF DELIVERED PROPERTY

Section 74.401. Sale of Property

(a) Except as provided by Subsection (c), the state treasurer shall sell at public sale all personal property, other than money, delivered to the state treasurer in accordance with Section 74.301. The state treasurer shall conduct the sale in the city in this state that the state treasurer determines affords the most favorable market for the particular property.

(b) The state treasurer shall sell the property to the highest bidder. If the state

treasurer determines that the highest bid is insufficient, the state treasurer may decline that bid and offer the property for public or private sale.

(c) The state treasurer is not required to offer property for sale if the property belongs to a person with an address outside this state or the state treasurer determines that the probable cost of the sale of the property exceeds its value.

(d) If after investigation the state treasurer determines that property delivered from a safe deposit box or other repository has insubstantial commercial value, the state treasurer may destroy or otherwise dispose of the property at any time.

(e) A person may not maintain any action or proceeding against the state, an officer of the state, or the holder of property because of an action taken by the state treasurer under this section.

Section 74.402. Notice of Sale

(a) Before the 21st day preceding the day on which a sale, public or private, is held under Section 74.401, the state treasurer shall publish notice of the sale in a newspaper of general circulation in the county where the sale is to be held.

Section 74.403. Purchaser's Title

(a) At a sale, public or private, of property that is held under this subchapter, the purchaser receives title to the purchased

property free from all claims of the prior owner and prior holder of the property and all persons claiming through or under the owner or holder.

(b) The state treasurer shall execute all documents necessary to complete the transfer of title.

[Sections 74.404-74.500 reserved for expansion]

SUBCHAPTER F. CLAIM FOR DELIVERED PROPERTY

Section 74.501. Filing of Claim

(a) Except as provided by Subsection (b), claim for property or proceeds from the sale of property delivered to the state treasurer under this chapter, including claims by other states, must be filed with the state treasurer.

(b) If a claim is for inactive property that was held by a depository before being delivered to the state treasurer, the claim may be filed with the depository under Section 74.502.

(c) All claims to which this section applies must be filed in accordance with procedures and on forms prescribed by the state treasurer.

Section 74.502. Claim filed with Depository

(a) If inactive property held by a depository under Chapter 73 is delivered to the state treasurer under Section 74.301, a claim

may be filed with the depository except that any claim by another state must be filed with the state treasurer. The state treasurer shall prescribe forms and procedures for filing claims with depositories.

(b) If a claim is filed with a depository under this section and the depository determines in good faith that the claim is valid, the depository may pay the amount of the claim.

(c) If the amount paid under Subsection (b) is $100 or less, the state treasurer shall reimburse the depository on receipt of a written statement subscribed and sworn to by an officer of the depository that states:

(1) the name and address of the person to whom payment was made; and

(2) that the depository believes in good faith that the claim is valid.

(d) If the amount paid under Subsection (b) is more than $100, the state treasurer and the attorney general shall examine the claim and any supporting affidavit or evidence of the claim. Before the state treasurer may reimburse a depository for a claim under this subsection, the claim must be approved and signed by the state treasurer and the attorney general.

Section 74.503. Consideration of Claim

The state treasurer and the attorney general or their authorized agents jointly shall consider the validity of each claim filed under this subchapter.

Section 74.504. Hearing

(a) The state treasurer and the attorney general may hold a hearing and receive evidence concerning a claim filed under this subchapter.

(b) If the state treasurer and the attorney general consider that a hearing is necessary to determine the validity of a claim, both the state treasurer and the attorney general shall sign the statement of the findings and the decision on the claim. The statement shall report the substance of the evidence heard and the reasons for the decision. The statement is a public record.

(c) If the state treasurer and the attorney general determine that a claim is valid, they shall approve and sign the claim.

Section 74.505. Payment of Claim

(a) If a claim is for money and has been approved under this subchapter, the state treasurer shall pay the claim.

(b) If a claim is for personal property other than money and has been approved under this subchapter, the state treasurer promptly shall deliver the property to the claimant unless the state treasurer has

sold the property. If the property has been sold under Section 74.401, the state treasurer shall pay to the claimant the proceeds from the sale.

(c) Costs of publication and postage shall be deducted from the amounts paid under this section, but deductions for any costs of administration or service charges may not be made.

Section 74.506. Appeal

(a) A person aggrieved by the decision of a claim filed under this subchapter may appeal the decision before the 61st day after the day on which it was rendered.

(b) If a claim has not been decided before the 91st day after the day on which it was filed, the claimant may appeal within the 60-day period beginning on the 91st day after the day of filing.

(c) An appeal under this section must be made by filing suit against the state in a district court in Travis County, Texas, or in the county in which the claimed funds were deposited. The state's immunity from suit without consent is abolished with respect to suits brought under this section.

(d) A court shall try an action filed under this section de novo and shall apply the rules of practice of the court.

Section 74.507. Fee for Recovery

A person who informs a potential claimant that the claimant may be entitled to claim property that is reportable to the State Treasurer under this chapter, that has been reported to the State Treasurer, or that is in the possession of the State Treasurer, or a person who files a claim under this subchapter for such property on behalf of a claimant, may not contract for or receive from the claimant for services an amount that exceeds 10 percent of the value of the property recovered. If the property involved is mineral proceeds, the amount for services may not include a portion of the underlying minerals or any production payment, overriding royalty, or similar payment.

Section 74.508. Claim of Another State to Recover Property; Procedure

(a) At any time after property has been paid or delivered to the State Treasurer under this Act, another state may recover the property if:

(1) the property was subjected to custody by this state because the records of the holder did not reflect the last known address of the apparent owner when the property was presumed abandoned under this Act, and the other state establishes that the last known address of the apparent owner or other person entitled to the property was in that state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(2) the last known address of the apparent owner or other person entitled to the property, as reflected by the records of the holder are in the other state and under the laws of that state the property has escheated to or become subject to a claim of abandonment by that state;

(3) the records of the holder were erroneous in that they did not accurately reflect the actual owner of the property and the last known address of the actual owner is in the other state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(4) the property was subjected to custody by this state under Subdivision (6) of Subsection (a) of Section 72.001 and under the laws of the state of domicile of the holder the property has escheated to or become subject to a claim of abandonment by that state; or

(5) the property is the sum payable on a traveler's check, money order, or other similar instrument that was subjected to custody by this state under Subdivision (4) and the instrument was purchased in the other state and under the laws of that state the property escheated to or became subject to a claim of abandonment by that state.

(b) The claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the State Treasurer, who shall decide the claim within 90 days after it is presented. The State Treasurer shall allow the claim if he determines that the other state is entitled to the abandoned property under Subsection (a).

[Sections 74.509-74.600 reserved for expansion]

SUBCHAPTER G. UNCLAIMED MONEY FUND

Section 74.601. Fund

(a) The state treasurer shall maintain a fund known as the unclaimed money fund.

(b) The state treasurer shall deposit to the credit of the fund:

(1) all funds delivered to the state treasurer under this chapter; or any other statute requiring the delivery of unclaimed property to the state treasurer;

(2) all proceeds from the sale of any property under this chapter.

(3) all funds that have escheated to the state under Chapter 71, except that funds relating to escheated real property shall be deposited according to Section 71.202; and

(4) any income derived from investments of the fund.

(c) The state treasurer shall keep a separate record and accounting for delivered unclaimed property, other than money, before its sale.

(d) The state treasurer, shall from time to time invest the amount in the unclaimed money fund that exceeds $50,000 in investments approved by law for the investment of state funds.

Section 74.602. Use of Fund

(a) Except as provided by Subsection (b), the state treasurer shall use the unclaimed money fund to pay the claims of persons or states establishing ownership of property in the possession of the state treasurer under this chapter or any other unclaimed property or escheat statute.

(b) Any funds remaining in the unclaimed money fund shall be transferred, at least once each fiscal year, in an amount that in the state treasurer's judgment would leave a balance sufficient to pay the anticipated expenses and claims of the fund, to the foundation school fund and to the general revenue fund in equal amounts.

(c) The state treasurer and the attorney general may use the unclaimed money fund generally for the enforcement and administration of this title, including the expenses of sale, forms, notices, examin-

ations, travel, court costs, supplies, equipment, employment of necessary personnel, and any other necessary expenses.

Section 74.603. Audit; Appropriation

The unclaimed money fund is subject to audit by the state auditor and to appropriation by the legislature for enforcing and administering this title.

[Sections 74.604-74.700 reserved for expansion]

SUBCHAPTER H. ENFORCEMENT

Section 74.701. Rules

The state treasurer may adopt rules necessary to carry out this title.

Section 74.702. Examination of Records

(a) To enforce this chapter and to determine whether reports have been made as required by this chapter, the state treasurer, the attorney general, or an authorized agent of either, at any reasonable time, may examine the books and records of the holder.

(b) The state treasurer, the attorney general, or an agent of either may not make public any information obtained by an examination made under this section and may not use that information except in the course of a judicial proceeding, authorized by this chapter, in which the state is a party.

Section 74.703. Additional Personnel

(a) The state treasurer and the attorney general may employ, in the office of either official, additional personnel necessary to enforce this title.

(b) The salary rate of additional personnel may not exceed the rate paid to other state employees for similar services.

(c) The salaries of additional personnel shall be paid in accordance with Section 74.602.

Section 74.704. Assistance in Enforcement

If the state treasurer or the attorney general requests, the state auditor, state comptroller, banking commissioner, securities commissioner, insurance commissioner, savings and loan commissioner, Credit Union Commission, Department of Public Safety, or any district or county attorney shall assist the state treasurer or attorney general in enforcing this title.

Section 74.705. Interest, Attorney's Fees, and Penalties

(a) A person who fails to pay or deliver property within the time prescribed by this chapter shall pay to the State Treasurer interest, at the judgment rate of interest as published by the consumer credit commissioner in the Texas Register, on the property or value of the property from the date the property should have been paid or delivered until the date the property is actually paid or delivered.

(b) If the State Treasurer presents a claim for unclaimed property to a person who fails timely to pay or deliver the property and the just amount of unclaimed property owed has not been tendered before the 31st day after the date the claim is presented, the State Treasurer may, on approval of a court of competent jurisdiction in Travis County, recover reasonable attorney's fees from the person in addition to unclaimed property and interest due.

(c) A person commits an offense if the person:

(1) wilfully fails to file a report required by this chapter;

(2) refuses to permit examination of records in accordance with this chapter;

(3) makes a deduction from or a service charge against a dormant account or dormant deposit of funds; or

(4) violates any other provision of this title.

(d) An offense under this section is punishable by:

(1) a fine of not less than $500 nor more than $1,000;

(2) confinement in jail for a term not to exceed six months; or

(3) both the fine and confinement.

(e) In addition to a criminal penalty, a person who commits an offense under Subsection (c) is subject to a civil penalty not to exceed $100 for each day of the violation. The attorney general shall collect civil penalty by bringing suit on behalf of the state in a district court in Travis County, Texas.

CHAPTER 75. TEXAS MINERALS

SUBCHAPTER A. APPLICABILITY

Section 75.001. Definitions; Application of Chapter

(a) in this chapter:

(1) "Mineral" means oil, gas, uranium, sulphur, lignite, coal, and any other substance that is ordinarily and naturally considered a mineral in this state, regardless of the depth at which the oil, gas, uranium, sulphur, lignite, coal, or other substance is found.

(2) "Mineral proceeds" includes:

(A) all obligations to pay resulting from the production and sale of minerals, including net revenue interest, royalties, overriding royalties, production payments, and joint operating agreements; and

(B) all obligations for the acquisition and retention of a mineral lease, including bonuses, delay rentals, shut-in royalties, and minimum royalties.

(3) "Holder" means a person, wherever organized or domiciled, who is:

(A) in possession of property that belongs to another;

(B) a trustee; or

(C) indebted to another on an obligation.

(b) This chapter applies to mineral proceeds and the owner's underlying right to receive those mineral proceeds if:

(1) the owner's underlying right to receive mineral proceeds is related to land located in this state;

(2) the mineral proceeds result from the production of minerals located in this state; or

(3) the mineral proceeds are an obligation for the acquisition or retention of a mineral lease to produce minerals located in this state.

(c) A holder of property presumed abandoned under this chapter is subject to the procedures of Chapter 74.

(d) This chapter supplements other chapters in this title, and each chapter shall be followed to the extent applicable.

[Sections 75.002-75.100 reserved for expansion]

SUBCHAPTER B. PRESUMPTION OF ABANDONMENT

Section 75.101. Presumption of Abandonment

(a) All mineral proceeds that are held or owing by the holder and that have remained unclaimed by the owner for longer than three years after they became payable or distributable and the owner's underlying right to receive those mineral proceeds are presumed abandoned.

(b) At the time any owner's underlying right to receive mineral proceeds is presumed abandoned under this section, any mineral proceeds then held for or owing to the owner as a result of the underlying right and any mineral proceeds accruing after that time as a result of the underlying right and not previously presumed abandoned are presumed abandoned.

Section 75.102. Preservation of Property

A holder of abandoned property shall preserve that property and may not by any procedure, including a deduction for service, maintenance, or other charge, transfer, convert, or reduce the property to the profits or assets of the holder.

Transitional Rule

(a) Except as provided in Subsection (b) of this section, the first report filed under Title 6, Property Code, as amended by this Act shall be due on or before November 1, 1985, and shall include all property presumed abandoned or inactive under Title 6 as of June 30, 1985, unless the holder has previously reported or delivered the property to the state treasurer.

(b) If the holder is a life insurance company, the first report filed under Title 6, Property Code, as amended by this Act shall be due on or before May 1, 1986, and shall include all property presumed abandoned under Title 6 as of December 31, 1985.

(c) Property presumed abandoned or inactive under Title 6 of the Property Code before the effective date of this Act, and for which a report has been filed with the state treasurer, shall be delivered to the state treasurer in accordance with Title 6 of the Property Code as it existed before being amended by this Act, and that law is continued in effect for that purpose.

MISCELLANEOUS PROVISIONS OF S. B. 906,
69TH LEGISLATURE, REGULAR SESSION, 1985

NAT. RES. CODE ANN., 91.403
(VERNON 1978)
(Subsection (c) is new material)

Section 91.403. Payment of Interest on Late Payments

(a) If payment has not been made for any reason in the time limits specified in Section 91.402(a) of this code, the payor must pay interest to a payee beginning at the expiration of those time limits at the rate charged on loans to depository institutions by the New York Federal Reserve Bank, unless a different rate of interest is specified in a written agreement between payor and payee.

(b) Subsection (a) of this section does not apply where payments are withheld or suspended by a payor beyond the time limits specified in Section 91.402(a) of this code because there is:

(1) a dispute concerning title that would affect distribution of payment;

(2) a reasonable doubt that the payee does not have a clear title to the interest in the proceeds of production; or

(3) a requirement in a title opinion that places in issue the title, identity, or whereabouts of the payee and that

has not been satisfied by the payee after a reasonable request for curative information has been made by the payor.

(c) The payor's obligation to pay interest and the payee's right to receive interest under Subsection (a) of this section terminate on delivery of the proceeds and accumulated interest to the state treasurer as provided by Title 6, Property Code.

REPEAL OF COUNTY ESCHEAT STATUTE

Chapter 321, Acts of 66th Legislature, Regular Session, 1979 (Article 1581h, Vernon's Texas Civil Statutes) is repealed.

BRIEF OF THE STATE OF TEXAS IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

EXHIBIT B

Library References

Escheat 8(2).
C.J.S. Escheat §§20, 21.

ARTICLE III--UNCLAIMED PROPERTY HELD OR OWING BY BANKING ORGANIZATIONS

Section
306. Reimbursement for instruments paid.

§ 300. Unclaimed property held or owing by banking organizations.

1. The following unclaimed property held or owing by banking organizations shall be deemed abandoned property:

(a) Any amounts due on deposits or any amounts to which a shareholder of a savings and loan association or a credit union is entitled, held or owing by a banking organization, which shall have remained unclaimed for five years by the person or persons appearing to be entitled thereto, including any interest or dividends credited thereon, excepting

(i) any such amount which has been reduced or increased, exclusive of dividend or interest payment, within five years or

(ii) any such amount which is represented by a passbook not in the possession of the banking organization, which has been presented for entry of dividend or interest credit within five years, or

(iii) any such amount with respect to which the banking organization has on file written evidence

received within five years that the person or persons appearing to be entitled to such amounts had knowledge thereof, or

(iv) any such amount payable only at or by a branch office located in a foreign country, or payable in currency other than United States currency, or

(v) any amount held or owing by the banking organization as agent, or as trustee of an express trust (active or passive), for the purpose of making payment to holders of, or in respect of, stocks, bonds or other securities of a governmental or other public issuer.

(b) Any amounts, together with all accumulations of interest or other increment thereon, held or owing by a banking organization for the payment of an interest in a bond and mortgage apportioned or transferred by it pursuant to subdivision seven of former section one hundred eighty-eight of the banking law as it existed prior to July first, nineteen hundred thirty-seven, which shall have remained unclaimed by the person or persons appearing to be entitled thereto for five years after the full and final liquidation of such mortgage, excepting

(i) any such amount which has been reduced by payment to the person or persons appearing to be entitled thereto within five years, or

(ii) any such amount which is represented by a certificate of share ownership not in the possession of the banking organization, which certificate has been presented for transfer within five years, or

(iii) any such amount with respect to which the banking organization has on file written evidence received within five years that the person or persons

appearing to be entitled to such amount had knowledge thereof.

(c) Any amount held or owing by a banking organization for the payment of a negotiable instrument under article three of the uniform commercial code or a certified check whether negotiable or not, on which such organization is directly liable, which instrument shall have been outstanding for more than five years from the date it was payable or from the date of its issuance, if payable on demand; provided, however, the provisions of this paragraph (c) shall not apply

(i) to any negotiable instrument payable outside the continental limits of the United States, or

(ii) to any instrument payable in currency other than United States currency, or

(iii) to any negotiable instrument issued to pay out any amount held or owing by the banking organization as agent, or as trustee of an express trust (active or passive), for the purpose of making payment to holders of, or in respect of, stocks, bonds or other securities of a governmental or other public issuer.

(d) After the expiration of three years from the opening of any vault, safe deposit box or other receptacle by a banking organization pursuant to the provisions of the banking law, any surplus amounts arising from a sale by such banking organization of the contents of such vault, safe deposit box or other receptacle pursuant to the provisions of the banking law, the balance remaining of any United States coin or currency among the contents of such vault, safe deposit box or other receptacle and the balance remaining of the proceeds of the principal of or interest or dividends

on any securities among the contents of such vault, safe deposit box or other receptacle or the securities themselves which have remained unsold by the banking organization.

(e) any amount or security representing a dividend or other payment received (i) after June thirtieth, nineteen hundred forty, by a banking organization or its nominee as the record holder of any stock, bond, or other security of any corporation, association or joint stock company to which amount or security an unknown person (except a person entitled to such dividend or other payment upon the surrender of other outstanding securities) is entitled or (ii) on or after July first, nineteen hundred seventy-four by a banking organization or its nominee other than as a holder of record or as holder of record for known persons on any stock, bond or other security of any corporation, association or joint stock company or (iii) on or after July first, nineteen hundred eighty-four by a banking organization or its nominee on any stock, bond, or other security of a governmental or other public issuer, (1) which shall have remained unclaimed by the person entitled thereto for three years after receipt thereof by such banking organization or its nominee, or (2) when the stock, bond or other security with respect to which such amount or security representing a dividend or other payment is payable has been deemed abandoned.

(f) Except as provided in paragraph (e) of this subdivision, any stock, bond or other security of any corporation, association or joint stock company received on or after July first, nineteen hundred seventy-seven or any stock, bond or other security of any governmental or other public issuer received on or after July first, nineteen hundred eighty-four by a banking organization or its nominee and held by such banking

organization or its nominee (1) as holder of record of such stock, bond or other security, or (2) as custodian, trustee or fiduciary for a person other than the issuer with respect to such stock, bond or other security, or (3) for unknown persons where, for three successive years, (i) all amounts payable upon such stocks, bonds, or other securities of any corporation, association or joint stock company and received by such banking organization or its nominee on or after July first, nineteen hundred seventy-seven or all amounts payable upon such stocks, bonds, or other securities of any governmental or other public issuer and received by such banking organization or its nominee on or after July first, nineteen hundred eighty-four have remained unclaimed by the person entitled thereto, and (ii) no written communication concerning such stock, bond or other security has been received from the person entitled thereto by such banking organization or its nominee.

(g) Any stock, bond, or other security held by a banking organization in any vault or other storage area in any capacity other than as set forth in paragraphs (d), (e) or (f) of this subdivision where, for three successive years, (i) such stock, bond or other security has remained unclaimed by the person entitled thereto, and (ii) no written communication concerning such stock, bond or other security has been received from the person entitled thereto by such banking organization.

(h) Any amount or security which, on or after January first, nineteen hundred forty-seven, shall have become payable or deliverable by a banking organization, as agent or trustee for a foreign or domestic corporation or fiduciary engaged in the conduct of business, to a resident when such amount or

security shall have remained unpaid or undelivered to the person or persons entitled thereto for three years.

(i) Any amount or security which shall have become payable or deliverable by a banking organization, as agent or trustee for a corporation, association or joint stock company which shall have discontinued the conduct of its business, or the corporate existence of which shall have terminated, without the right to receive such amount having passed to a sucessor or successors, and which shall have remained unpaid or undelivered to the person or persons entitled thereto for three years.

(j) Any amount which, on or after January first, nineteen hundred thirty-seven, shall have become payable by a banking organization (other than a foreign banking corporation) to a holder or owner of its capital stock, and which shall have remained unclaimed for three years by the person or persons appearing to be entitled thereto.

(k) Lost property or instruments as defined in section two hundred fifty-one of the personal property law which shall have been held by a safe deposit company or bank for five years pursuant to the provisions of section two hundred fifty-six of the personal property law.

2. Any abandoned property held or owing by a banking organization to which the right to receive the same is established to the satisfaction of such banking organization shall cease to be deemed abandoned.

3. A deposit made with a banking organization directly by a court or by a guardian pursuant to order of a court for the benefit of a person who was an infant at the time of the making of such

deposit, which deposit is subject to withdrawal only upon the further order of such court, shall not be subject to the provisions of this chapter until such infant attains the age of eighteen years or until the death of such infant whichever event occurs sooner.

4. As used in sections three hundred to three hundred three inclusive of this article, the term "banking organization" shall be deemed to include the New York agency or agencies of all foreign banking corporations licensed to do business in this state pursuant to article five of the banking law, and the word "deposits" shall be deemed to include credit balances maintained by such agencies for the account of others in accordance with the provisions of section two hundred two-a of the banking law.

PROOF OF SERVICE

I MARY F. KELLER, certify that I am counsel of record for Plaintiff in Intervention, the State of Texas, that I am a member of the Bar of the Supreme Court of the United States, and that on the 6th day of January, 1989, I served copies of the foregoing Motion for Leave to File Complaint in Intervention, Complaint in Intervention, and Brief in Support of Motion for Leave to File Complaint, on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

The Honorable Mario M. Cuomo
Governor of the State of New York
New York State Capitol
Eagle & Washington Avenues
Albany, New York 12224

The Honorable Robert Abrams
Attorney General of the
State of New York
120 Broadway, 25th Floor
New York, New York 10271

Mr. Christopher Keith Hall
Counsel of Record
Assistant Attorney General
120 Broadway
New York, New York 10271

The Honorable Michael N. Castle
Governor of the State of Delaware
820 N. French Street, 12th Floor
Wilmington, Delaware 19801

The Honorable Charles M. Oberley, III
Attorney General of the
State of Delaware
820 North French Street
Wilmington, Delaware 19801

Mr. Richard L. Sutton
Counsel of Record
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899

MARY F. KELLER
First Assistant Attorney General
State of Texas

FILED
FEB 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION OF THE STATE OF TEXAS TO INTERVENE

Charles M. Oberly, III
Attorney General of Delaware
Fred S. Silverman
Chief Deputy Attorney General
J. Patrick Hurley, Jr.
Assistant Attorney General
Richard L. Sutton, Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899
(302) 658-9200

Attorneys for Plaintiff
The State of Delaware

February 13, 1989

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8900

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
ARGUMENT	2
DISCRETIONARY INTERVENTION UNDER RULE 24(b) SHOULD NOT BE GRANTED TO ADD COLLATERAL SUBJECT MATTER TO THIS ACTION ABSENT A SHOWING OF NEED BY THE MOVANT	2
CONCLUSION	5
PROOF OF SERVICE	6

TABLE OF AUTHORITIES

CASES: Page

City of Rockford v. Secretary of Housing and Urban Development, 69 F.R.D. 363 (N.D. Ill. 1975) 4

Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 315 F.2d 564 (7th Cir. 1963) 4

National American Corp. v. Federal Republic of Nigeria, 425 F.Supp. 1365 (S.D.N.Y. 1977) 4

Pennsylvania v. New York, 407 U.S. 206 (1972) 3

Sutphen Estates, Inc. v. United States, 342 U.S. 19 (1951). 4

Texas v. New Jersey, 379 U.S. 674 (1965) 2

OTHER AUTHORITIES:

7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure*, § 1913 (1986) 2

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION OF THE STATE OF TEXAS TO INTERVENE

STATEMENT OF THE CASE

With the permission of this Court of May 31, 1988, the State of Delaware has commenced an original action against defendant, The State of New York, due to New York's escheating of intangible property from Delaware-incorporated securities brokers which property has been abandoned by persons or entities for whom the brokers' records show no names or last known addresses ("Unknowns").

The State of Texas now seeks leave to file a complaint in intervention. To the extent Texas seeks intervention, as of right, to assert a claim to some of the abandoned intangible property of Unknowns being escheated by New York from Delaware-incorporated brokers, Delaware takes no position.

Delaware does oppose Texas' intervention to the extent that it seeks to assert claims to abandoned intangible property which is not the subject of this action ("Additional Claims").

Specifically, Delaware opposes intervention by Texas to assert paragraphs 43 through 56 of its proposed Complaint in Intervention[1] which would add to the subject matter of this action abandoned intangible property of Unknowns being escheated by New York either (1) from a New York corporation, The Depository Trust Company ("DTC"), a securities clearing house; or (2) from broker members of DTC (other than Delaware-incorporated brokers) where the escheated property is a Texas governmental security or a distribution thereon ("Additional Excess Receipts").[2]

ARGUMENT

Discretionary Intervention under Rule 24(b) should not be granted to add collateral subject matter to this action absent a showing of need by the movant.

Texas seeks intervention to assert its Additional Claims to Additional Excess Receipts under Rule 24(b) of the Federal Rules of Civil Procedure.[3] This makes its intervention entirely in the Court's discretion. 7C C. Wright, A. Miller and M. Kane, *Federal Practice and Procedure* §1913 at 376-77 (1986). Exercise of that discretion is not warranted here, where Texas has made no showing why this action needs to be burdened by such Additional Claims to property not now before the Court.

When this Court took up the conflicting claims of the various states to the escheat of intangible personal property, it undertook (for obvious salutary reasons) to fix rules to govern the escheat of all such intangible obligations. *Texas v. New Jersey*, 379 U.S. 674, 678 (1965).

One of the rules there adopted was that the state of incorporation of a corporate holder of abandoned intangible property may escheat such property if the corporate holder

---

1. Motion of the State of Texas for Leave to File Complaint in Intervention; and Brief of the State of Texas in Support of Motion for Leave to File Complaint in Intervention ("Texas Motion and Brief") pp. 32-36.

2. Texas Motion and Brief, pp. 33, 35.

3. Texas Motion and Brief, p. 59.

had no record of a last known address for the beneficial owner of the intangible property. 379 U.S. at 682. This rule was reaffirmed in *Pennsylvania v. New York*, 407 U.S. 206 (1972).

Delaware's action in this Court seeks to enforce that rule against New York which has been escheating from Delaware-incorporated brokerage houses substantial property of Unknowns.[4] New York defends Delaware's action on the ground that it is not escheating property of Unknowns but rather somehow in fact is escheating property which is that of New York domiciled owners.[5]

Texas seeks intervention to urge that this Court modify the rule of *Texas v. New Jersey, supra*, in which it was a participant, and reaffirmed in *Pennsylvania v. New York, supra*. Texas now seeks to argue that abandoned intangible property of Unknowns should be escheated to the state of incorporation of the issuer of a security constituting or giving rise to the abandoned property.[6]

Delaware takes no position as to Texas' intervention to make its new argument as to the property which is the subject matter of Delaware's action. Texas concedes that the outcome of Delaware's action will control the outcome of the Additional Claims for Additional Excess Receipts.[7] Thus, should this Court allow Texas to intervene to assert its theory of escheat as to the subject matter of the Delaware action, Texas could make its new argument and seek to protect whatever hoped for claim it has to any abandoned intangible property held for Unknowns and issued by Texas issuers.

However, as to intervention by Texas to assert the Additional Claims to Additional Excess Receipts, Texas admits that a determination of such claims will turn on "arguments which are relevant and peculiar to the Additional Excess Receipts."[8] Yet this Court will look in vain at Texas' moving papers for any

---

4. Texas Motion and Brief, pp. 20-21.
5. Texas Motion and Brief, p. 21.
6. Texas Motion and Brief, pp. 36, 37, 62-63.
7. Texas Motion and Brief, p. 35-36.
8. Texas Motion and Brief, p. 36.

explanation showing why Texas' interest will be prejudiced unless Delaware's action is burdened with matters "peculiar to" property not the subject of Delaware's claims.

This Court has previously declined a sought after permissive intervention where it would without need add a collateral issue to the litigation before the Court. *Sutphen Estates, Inc. v. United States*, 342 U.S. 19, 23 (1951). Delaware urges the Court likewise to reject Texas' intervention to assert the Additional Claims to the Additional Excess Property. *See Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 315 F.2d 564 (7th Cir. 1963) (affirming denial of intervention where damages issues differed from pending action); *National American Corp. v. Federal Republic of Nigeria*, 425 F. Supp. 1365, 1372-73 (S.D.N.Y. 1977) (denial based in part on "the necessity of additional proof"); *City of Rockford v. Secretary of Housing and Urban Develop.*, 69 F.R.D. 363, 366 (N.D. Ill. 1975).

CONCLUSION

For the foregoing reasons, Delaware respectfully requests this Court to deny the Motion of the State of Texas to Intervene to assert herein Additional Claims to Additional Excess Receipts.

Respectfully submitted,

Charles M. Oberly, III
Attorney General of Delaware

Fred S. Silverman
Chief Deputy Attorney General

J. Patrick Hurley, Jr.
Assistant Attorney General

Richard L. Sutton
Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

February 13, 1989

PROOF OF SERVICE

I, RICHARD L. SUTTON, certify that I am counsel of record for plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 13th day of February, 1989, I served copies of the foregoing Plaintiff's Brief In Opposition To Motion Of The State Of Texas To Intervene, on all parties required to be served by depositing such copies, first-class postage prepaid, in a United States Post Office, addressed as follows:

Mary F. Keller, Esquire
First Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Christopher Keith Hall, Esquire
Assistant Attorney General
Attorney General's Office
120 Broadway
New York, New York 10271

_____

Richard L. Sutton
Counsel of Record for Plaintiff,
the State of Delaware
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899
(302) 658-9200

MOTION FILED
APR 19 1989

(10)

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, *Plaintiff in Intervention*

STATE OF IDAHO, *Plaintiff in Intervention*

v.

STATE OF NEW YORK, *Defendant*

MOTION OF THE STATE OF IDAHO FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; AND COMPLAINT IN INTERVENTION

Of Counsel:

JAMES T. JONES
Attorney General
State of Idaho

THEODORE V. SPANGLER, JR.*
Deputy Attorney General

LAWRENCE G. SIRHALL, JR.
Deputy Attorney General

Attorneys for the State of Idaho

P.O. Box 36
Boise, ID 83722
(208) 334-7530

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

15 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

MOTION OF THE STATE OF IDAHO FOR LEAVE TO FILE COMPLAINT IN INTERVENTION 1

COMPLAINT IN INTERVENTION 6

TABLE OF AUTHORITIES

Page

CASES:

Pennsylvania v. New York, 407 U.S. 206 (1972) 4

Texas v. New Jersey, 379 U.S. 674 (1965) 9

Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961) 4

FEDERAL CONSTITUTION:

Article III, Section 2 6

FEDERAL STATUTES AND REGULATIONS:

28 U.S.C. § 1251 6

STATE STATUTES AND REGULATIONS:

Idaho Code § 14-501 through § 14-541 ..... 9, 10

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, *Plaintiff in Intervention*

STATE OF IDAHO, *Plaintiff in Intervention*

v.

STATE OF NEW YORK, *Defendant*

MOTION OF THE STATE OF IDAHO FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Idaho, a sovereign state of the United States of America, by and through Attorney General Jim Jones, moves this Court for an order permitting it to intervene as a Party Plaintiff in the above entitled cause. In support of this Motion, the State of Idaho would show the Court as follows:

I.

1. On or about May 31, 1988, this Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to

which state is entitled to claim and take possession of certain unclaimed intangible property, consisting of moneys and other intangible property ("excess receipts"), held by securities brokerage houses incorporated in Delaware.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On February 21, 1989, this Court granted the motion of the State of Texas to file a Complaint in Intervention.

4. As specifically and particularly set forth in the Complaint in Intervention filed by the State of Texas on or about January 6, 1989, the theory of which the State of Idaho endorses and espouses in full, the State of Idaho claims a portion of the excess receipts which constitute the unclaimed property that is the subject matter of this controversy. Idaho claims a portion of these excess receipts for the reason that they constitute a debt owed by the issuing entity (the "Issuer") to the securities beneficial owner. If the identity of the beneficial owner remains unknown, the excess receipts should be remitted to the state of incorporation of the Issuer under that state's unclaimed property law. Idaho accordingly claims those excess receipts held or formerly held by Delaware brokerage firms generated by Issuers incorporated in the state of Idaho.

5. As specifically and more particularly set forth in the proposed Complaint filed in Intervention by the state of Texas on or about January 6, 1989, the amount of excess receipts in issue in this litigation that Idaho is entitled to claim is presently unknown, but is very substantial.

6. The decision of the Court in this action will conclusively determine the right of Idaho to claim and take possession of these excess receipts. If the argument of either Delaware or New York is accepted, Idaho will be forever precluded from taking possession of unclaimed property of this nature.

7. Because Delaware and New York each assert conflicting claims to the subject excess receipts, Idaho's interest is not adequately represented by existing parties.

8. Based on the foregoing, Applicant is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure.

II.

9. Alternatively, Idaho urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

10. As specifically and more particularly set forth in Texas' proposed Complaint in Intervention filed on or about January 6, 1989, Idaho also requests the Court to consider and determine its claim to certain additional excess receipts, consisting of excess receipts held by the Depository Trust Company and excess receipts which have arisen in connection with distributions made by municipal and other governmental issuers ("additional excess receipts"). Idaho urges the Court to consider such additional excess receipts in connection with the lawsuit for the reason that they come into existence and acquire their character in the exact same manner as the excess receipts under consideration. Additionally, Idaho claims a portion of the additional excess receipts for the same

reason and on the same basis that it claims a portion of the excess receipts already at issue. Clearly, a determination of Idaho's right to claim and take possession of these additional excess receipts involves questions of law and fact presently before this Court.

11. As specifically and more particularly set forth in the proposed Complaint in Intervention filed by the State of Texas on or about January 6, 1989, Idaho cannot even estimate the amount of additional excess receipts subject to its claim. However, this amount is like to be substantial.

12. The Intervention of the State of Idaho in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the original parties.

13. The State of Idaho merely seeks to intervene in this action in order to preserve its rights should this Court rule favorably on the theory espoused by Texas.

III.

14. This Court, in *Western Union Telegraph Company v. Pennsylvania,* 368 U.S. 71 (1961), recognized the difficulties inherent in resolving respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. See, also, *Pennsylvania v. New York,* 407 U.S. 206 (1972). Based upon such an opportunity to present its claims, the State of Idaho urges this Court to grant it Motion for

Leave to File Complaint in Intervention as a Party Plaintiff herein.

Wherefore, the State of Idaho prays that it be permitted to intervene as a party plaintiff in this case in order to protect its rights should this Court rule favorably on the theory espoused by the State of Texas.

Respectfully submitted,

JAMES T. JONES
Attorney General of Idaho

THEODORE V. SPANGLER, JR.
Deputy Attorney General
Counsel of Record

LAWRENCE G. SIRHALL, JR.
Deputy Attorney General
Box 36
Boise, ID 83722
(208) 334-7530

Attorneys for the State of Idaho

DATE April 18, 1989

No. 111 Original

—o—

In The

Supreme Court of the United States

October Term, 1988

—o—

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, *Plaintiff in Intervention*

STATE OF IDAHO, *Plaintiff in Intervention*

v.

STATE OF NEW YORK, *Defendant*

—o—

COMPLAINT IN INTERVENTION

The State of Idaho, Plaintiff in Intervention, by Jim Jones, its Attorney General, with leave of the Court first had, files this Complaint in Intervention in the above styled and numbered cause, and complains and alleges as follows:

I.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II.

PENDING ACTION

2. On or about May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction

of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property ("excess receipts"), held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, this Court granted the State of Texas' Motion For Leave To File Complaint In Intervention.

III.

INTEREST AND CLAIM OF PLAINTIFF IN INTERVENTION

5. Plaintiff in Intervention, the State of Idaho, acts by and through the Attorney General of Idaho, the official of the State of Idaho charged with the duty under the Constitution and the laws of the State of prosecuting unclaimed property suits at the request of the State Tax Commission of the State of Idaho and of representing the State of Idaho in litigation generally.

6. This litigation involves a dispute as to which state is entitled to the custodial taking of certain unclaimed, intangible personal property ("excess receipts"), which comes into being and acquires its character as unclaimed property in the context of securities transactions. The excess receipts consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing ("Distributions"), held or formerly held by brokerage firms incorporated in the State of Delaware. The excess receipts are Distributions received by these

brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled. The excess receipts are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

7. The State of Idaho claims a portion of the excess receipts. Additionally, Idaho also requests that this Court consider and determine rights to certain additional excess receipts ("additional excess receipts") which have become an issue of this litigation by virtue of this Court's granting of Texas' Motion For Leave to File Complaint In Intervention.

8. Idaho is entitled to a portion of the excess receipts and additional excess receipts at issue in this litigation because they constitute a debt of the entity ("Issuer") initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ("Beneficial Owner") who has the economic rights to the security, including the entitlement to Distributions.

9. If the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be entitled to collect the excess receipts and additional excess receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the Issuer's state of incorporation when held by the Issuer's Paying Agent so it should be similarly remitted to the state of incorporation of the Issuer when held by other agents in the securities holding, transfer, and distribution system ("Distribution System"). Distribution generated by Issuers incorporated

in the State of Idaho and those generated by Idaho municipalities which are unclaimed and whose Beneficial Owner is unknown, should be returned to the State of Idaho. The claim of the state of Idaho is based upon the practical reality of the manner in which securities are traded and Distributions are paid, and relies upon a strict interpretation of this Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

10. By this action, Idaho seeks a judgment that New York pay to Idaho all excess receipts and additional excess receipts attributable to Issuers incorporated in the State of Idaho and those that are attributable to Idaho municipalities. Idaho further seeks a declaration that Idaho has the right in the future to claim and take possession of excess receipts and additional excess receipts without interference from any other state. The State of Idaho additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such excess receipts and additional excess receipts, and from expending any such sums collected, but presently unspent, which are attributable to Issuers incorporated in the State of Idaho and to Idaho municipalities, until such time as this controversy is resolved.

11. Idaho asserts its claim pursuant to Chapter 5 of Title 14, Idaho Code, § 14-501, *et seq.* (1988 Cum. Sup.), ("Idaho Code") which provides, in essence, for the custodial taking of abandoned or unclaimed tangible or intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been

asserted within the applicable dormancy period, which for most types of personal property is seven years.[1]

WHEREFORE, the State of Idaho as Plaintiff in Intervention prays:

1. That the State of Idaho be allowed to intervene herein;

2. That additional excess receipts held by the Depository Trust Company and demanded by or remitted to New York for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

3. That additional excess receipts attributable to Governmental Issuers held by the Depository Trust Company and all DTC Participants for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

4. That the temporary injunction sought by Delaware with respect to the excess receipts already at issue herein be extended, for the reasons stated in the Complaint of Delaware, to restrain New York from demanding or taking possession of all excess receipts attributable to Issuers incorporated in the State of Idaho or to Idaho Governmental Issuers;

---

[1]Since 1961, the State of Idaho has provided by statute that the State shall take custodial possession of unclaimed or abandoned property of unknown owners. Chapter 5 of Title 14 of the Idaho Code repealed and replaced former §§ 14-501-14-541, as added by 1980 Idaho Session Laws, ch. 281, § 1, which had repealed and had replaced former Idaho Code § 14-504-14-531, as added by 1961 Idaho Session Laws, ch. 162, § 1. These provisions reflect, with some modification, the 1981 Uniform Unclaimed Property Act.

5. That Defendant New York be restrained and enjoined from collecting any excess receipts and additional excess receipts attributable to Issuers Incorporated in the State of Idaho or attributable to Idaho Governmental Issuers, and from expending any sums collected but presently unspent, consisting of such excess receipts and additional excess receipts until such time as this controversy is resolved;

6. That judgment be entered that the excess receipts and additional excess receipts held by DTC and DTC Participants attributable to Issuers incorporated in the State of Idaho or to Idaho Governmental Issuers is subject only to the claims of the State of Idaho under the Idaho Code;

7. That New York be directed to pay or deliver to Plaintiff in Intervention all of the excess receipts and additional excess receipts paid or delivered to New York attributable to Issuers incorporated in the State of Idaho and Idaho Governmental Issuers which have been abandoned for the applicable dormancy period under the Idaho code;

8. That Plaintiff in Intervention be granted such other and further relief as this Court deems just.

Respectfully submitted,

JAMES T. JONES
Attorney General of Idaho

THEODORE V. SPANGLER, JR.
Deputy Attorney General
Counsel of Record

LAWRENCE G. SIRHALL, JR.
Deputy Attorney General
Box 36
Boise, ID 83722
(208) 334-7530

Attorneys for the
State of Idaho

DATE April 18, 1989

No. 111 Original

(11)

MOTION FILED
APR 20 1988

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff

STATE OF TEXAS,

Plaintiff-Intervenor

STATE OF ARIZONA,

Plaintiff in Intervention

v.

STATE OF NEW YORK,

Defendant

MOTION OF THE STATE OF ARIZONA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION

ROBERT K. CORBIN
Attorney General of Arizona

IAN A. MACPHERSON
Assistant Attorney General
Chief Counsel, Tax Division
Counsel of Record

GAIL H. BOYD
Assistant Attorney General

Department of Law
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

Attorneys for The State of Arizona

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

TABLE OF CONTENTS

Page

MOTION OF THE STATE OF ARIZONA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION..... 1

COMPLAINT IN INTERVENTION..... 7

TABLE OF AUTHORITIES

Page

CASES

Pennsylvania v. New York, 407 U.S. 206 (1972)..5, 12, 18

Texas v. New Jersey, 379 U.S. 674 (1965)..... *passim*

Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961) 5

STATE STATUTES

Arizona Uniform Unclaimed Property Act (1981 Act), A.R.S. §§ 44-301 - 44-340..... 4, 11

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. Pro. 9..... 1

Fed. R. Civ. Pro. 24(a)(2)..... 5

Fed R. Civ. Pro. 24(b)..... 5

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff

STATE OF TEXAS,

Plaintiff-Intervenor

STATE OF ARIZONA,

Plaintiff in Intervention

v.

STATE OF NEW YORK,

Defendant

MOTION OF THE STATE OF ARIZONA FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Arizona, a sovereign state of the United States of America, by and through Attorney General Robert K. Corbin, moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting its proposed Complaint in Intervention, attached hereto, to be filed in this action. To the extent appropriate, the Brief in Support of Motion for Leave to File heretofore filed by the State of Texas, Plaintiff-Intervenor, is relied upon by the State of Arizona to support this motion. In support of this motion, the State of Arizona would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("Excess Receipts"),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

4. As set forth in detail in its Complaint, Texas claims a portion of the Excess Receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of Excess Receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to Issuers incorporated in Texas.

---

[1] In its Complaint in Intervention, Texas has defined certain terms. Arizona utilizes those definitions herein.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to Issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts which have arisen in connection with Distributions made by Texas municipal and other governmental Issuers ("Additional Excess Receipts") which are now being demanded by or remitted to New York. It is the understanding of the State of Arizona ("Arizona") that the Court intends to consider claims to both the Excess Receipts originally at issue and the Additional Excess Receipts identified by Texas.

6. Texas claims a portion of the Excess Receipts and the Additional Excess Receipts for the reason that they constitute a debt owed by the Issuer to the securities' Beneficial Owner. If the identity of the Beneficial Owner is unknown, the Excess Receipts and Additional Excess Receipts should be remitted to the state of incorporation of the Issuer under the state's unclaimed property law.

7. Arizona claims a portion of the Excess Receipts and Additional Excess Receipts at issue in this action, specifically, that portion of the Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Arizona and that portion attributable to Arizona municipalities and other governmental entities.

8. The amount of Excess Receipts and Additional Excess Receipts that Arizona is entitled to claim is presently unknown. Arizona has never, prior to this lawsuit, had any reason to identify and quantify such Excess Receipts and Additional Excess Receipts. However, it is probable that at least one Issuer incorporated in Arizona

has generated Excess Receipts and Additional Excess Receipts. Moreover, it is a virtual certainty that bonds issued by Arizona municipalities and other governmental entities have generated Additional Excess Receipts subject to the claim of Arizona.

9. Arizona asserts its claim pursuant to the rule in *Texas v. New Jersey*, 379 U.S. 674 (1965) and the Arizona Revised Statutes § 44-301 *et seq.*, which provides, in essence, for the custodial taking of unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has bee ı asserted within the applicable dormancy period, which for most types of personal property is seven years.

10. Arizona supports Texas' Complaint in Intervention and adopts Texas' Brief in Support of Motion for Leave to File, and the factual and legal arguments set forth therein, to the extent that the same are applicable and relevant to the claims of Arizona set forth in Paragraph 7 above.

11. It is essential that Arizona be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law which will conclusively determine the future right of Arizona to claim and take possession of unclaimed property similar or identical in nature to the Excess Receipts and Additional Excess Receipts at issue herein. Additionally, if Arizona is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those Excess Receipts and Additional Excess

Receipts attributable to Issuers incorporated in Arizona. As a party, Arizona can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its unclaimed property law and ordering New York to tender such property to Arizona.

12. Based on the foregoing, Arizona is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Arizona urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of Arizona in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including Arizona, wishing to intervene and represent themselves in this case. The addition of Arizona as a Plaintiff in Intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. The Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. See, also, *Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an

opportunity to present its claim that Arizona seeks by urging this Court to grant leave to intervene herein.

Wherefore, Arizona prays that it be permitted to intervene as a party plaintiff in this case in order to assert the claims set forth in the attached Complaint in Intervention and to adopt as its own Texas' Brief in Support of the Motion for Leave to File as well as the factual and legal arguments asserted by Texas to the extent the same are relevant and applicable to the claims of Arizona.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of Arizona

IAN A. MACPHERSON
Assistant Attorney General
Chief Counsel, Tax Division
Counsel of Record

GAIL H. BOYD
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

Attorneys for the
State of Arizona

April 20, 1989

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff

STATE OF TEXAS,

Plaintiff-Intervenor

STATE OF ARIZONA,

Plaintiff in Intervention

v.

STATE OF NEW YORK,

Defendant

COMPLAINT IN INTERVENTION

The State of Arizona, ("Arizona") Plaintiff in Intervention, by Robert K. Corbin, its Attorney General, with leave of the Court first had, files this Complaint in Intervention in the above styled and numbered cause, and complains and alleges as follows:

I.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II.

PENDING ACTION

2. On or about May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On or about February 21, 1989 The Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

III.

INTEREST AND CLAIM OF ARIZONA AS PLAINTIFF IN INTERVENTION

5. Plaintiff in Intervention, the State of Arizona, acts by and through the Attorney General of Arizona, the official of the State of Arizona charged with the duty under the Constitution and the laws of the State of prosecuting unclaimed property suits at the request of the Arizona Department of Revenue and of representing the State of Arizona in litigation generally.

6. At present, this litigation involves a dispute as to which state is entitled to the custodial taking of certain unclaimed, intangible personal property ("Excess Receipts"), which comes into being and acquires its character as unclaimed property in the context of securities transactions. The Excess Receipts consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing ("Distributions"), held or formerly held by brokerage firms incorporated in the State of Delaware. The Excess Receipts are Distributions received by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled. The Excess Receipts are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

7. Arizona claims a portion of the Excess Receipts. Additionally, Arizona seeks to have this Court consider and determine rights to certain additional Excess Receipts ("Additional Excess Receipts") which are not yet part of this litigation which involves the same issues. These Additional Excess Receipts consist of: (a) excess receipts presently being remitted to New York which are held by the Depository Trust Company ("DTC"), a national clearinghouse for the settlement of trades in corporate and municipal securities; and (b) excess receipts arising from unclaimed principal and interest payments on municipal and state bonds which have never been remitted to any state. Additional Excess Receipts are of the same character and come into existence in the same manner as the Excess

Receipts at issue in the principal case and will necessarily be controlled by the Court's ruling in this case.

8. Arizona is entitled to a portion of the Excess Receipts at issue in this litigation (and to a portion of the Additional Excess Receipts it seeks to have the Court consider) because they constitute a debt of the entity ("Issuer") initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ("Beneficial Owner") who has the economic rights to the security, including the entitlement to Distributions.

9. If the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the Issuer's state of incorporation when held by the Issuer's Paying Agent (defined in part IV) so it should be similarly remitted to the state of incorporation of the Issuer when held by other agents in the securities holding, transfer, and distribution system ("Distribution System"). Distributions generated by Issuers incorporated in the State of Arizona and those generated by Arizona municipalities which are unclaimed and whose Beneficial Owner is unknown, should be returned to the State of Arizona. The claim of Plaintiff in Intervention is based upon the practical reality of the manner in which securities are traded and Distributions are paid, and relies upon a strict interpretation of this Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

10. By this action, Arizona seeks a judgment that New York pay to Arizona all Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Arizona and those that are attributable to Arizona municipalities. Arizona further seeks a declaration that Arizona has the right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts without interference from any other state. Arizona additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such Excess Receipts and Additional Excess Receipts, and from expending any such sums collected, but presently unspent, which are attributable to Issuers incorporated in the State of Arizona and to Arizona municipalities, until such time as this controversy is resolved.

11. Arizona asserts its claim pursuant to Title 44, Chapter 3, Article 1 of the Arizona Revised Statutes, Sections 44-301 to 44-340 (Arizona Uniform Unclaimed Property Act) which provides, in essence, for the custodial taking of abandoned or unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been asserted within the applicable dormancy period, which for most types of intangible property is seven years.

IV.

CLAIMS OF DELAWARE AND NEW YORK

12. Delaware and New York each argue that their respective claims to the Excess Receipts are supported by the rulings of this Court in *Texas v. New Jersey, supra,* and *Pennsylvania v. New York,* 407 U.S. 206 (1972). These cases establish the principle that unclaimed property is subject to being remitted to the state of the last known address of its owner. If that address is unknown, the property is to be remitted to the state of incorporation of the debtor.

13. Delaware asserts the right to claim the Excess Receipts at issue herein on the basis that the identity of said property's Beneficial Owner, whom Delaware equates with a creditor, is unknown. Therefore, the Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firm holding such funds, which is characterized by Delaware as the debtor.

14. New York, on the other hand, argues that the property's Beneficial Owner is always paid the Distributions to which he is entitled. The Beneficial Owner therefore has no claim to the Excess Receipts and his identity is irrelevant to the analysis of rights at issue herein. Instead, contends New York, the last known address of the brokerage firms that were underpaid, characterized by New York as the "creditor" firms, determines to which state the overpayments held by the "debtor" firms should be paid. Since most such brokerage firms have New York trading addresses, New York is entitled to claim the Excess Receipts.

15. The arguments of both Delaware and New York are based upon narrow technical and legalistic analyses of a complex Distribution System. Both Delaware's designation of the brokerage firms as "debtors", and New York's classification of the "underpaid" brokerage firms as "creditors", fail to properly characterize the relationships of the various parties to ownership and Distribution transactions of the present Distribution system. In this Distribution System, at least two Intermediaries are *always* involved in the routine processing of ownership trades and moving Distributions between the Issuer and the ultimate Beneficial Owner/Customer. Delaware is basically contending that the state of incorporation of the *last* Intermediary, the brokerage firm holding the Excess Receipts, determines the state to which all the unclaimed property is to be remitted. New York contends that all Excess Receipts should be remitted to New York for the reason that the principal business offices and headquarters of most of the Intermediary brokerage firms are located in the New York City area. Under either argument, the place of incorporation of mere Intermediaries, who act simply as transfer agents and who themselves as a rule make no claim to the Distributions, will determine which state can claim and take possession of hundreds of millions of dollars. As a practical matter under either states' theory, only two states would be legally authorized to claim the great bulk of these moneys.

V.

CLAIM OF ARIZONA

16. In both *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both equitable and easy to administer. In *Texas v. New Jersey, supra,* Mr. Justice Black adopted a rule that "involves a factual issue simple and easy to resolve and leaves no legal issue to be decided" and that "will tend to distribute escheats among the states in the proportion to the commercial activities of their residents." The rule was clear under these legal principles that when a Paying Agent could not find a last known address for the Record Owner, unclaimed dividends should be remitted to the state of incorporation of the Issuer. The same principle should be adopted in this litigation since the addition of more Intermediaries to the chain of distribution should not affect the entitlement of states to the Excess Receipts. This would also return these moneys to the states prorata according to each state's commercial activity, and would mitigate the harshness of the "winner take all" positions espoused by both Delaware and New York. This is the resolution urged by Arizona as a Plaintiff in Intervention. It is also the resolution urged by Texas as a Plaintiff-Intervenor.

17. The declaration of a dividend or principal and interest payments basically represents a debt between the Issuer and the Beneficial Owner. The Beneficial Owner is in fact the creditor and and the Issuer the debtor. All of these Excess Receipts are simple accounting errors occurring on at least three (3) different sets of books and

records. All Excess Receipts arise in the context of the chain of transactions between the debtor-Issuer and creditor-Beneficial Owner, and if the existence and location of the Beneficial Owner, is unknown, the Excess Receipts, pursuant to *Texas v. New Jersey, supra*, should be remitted to the state of incorporation of the Issuer.

VI.

ADDITIONAL EXCESS RECEIPTS

18. In addition to claiming a portion of the Excess Receipts held or formerly held by the brokerage firms and demanded by or remitted to New York, Arizona asserts a claim to certain Additional Excess Receipts demanded by or remitted to the State of New York which is not presently at issue in this case, but which should be considered by the Court. The property consists of those Additional Excess Receipts held by DTC or its Nominee, Cede & Co. It also consists of Additional Excess Receipts which have arisen in connection with Distributions made by Governmental Issuers, which property is only now being demanded by New York pursuant to a recent statutory amendment.

19. Arizona as a Plaintiff in Intervention believes that the amount of such Additional Excess Receipts greatly exceeds the amount of Excess Receipts presently in controversy.

20. As evidenced by its 1987 Annual Report, DTC holds huge amounts of Additional Excess Receipts. These

Additional Excess Receipts come into existence and acquire their character as unclaimed property in the same basic manner as the Excess Receipts held by DTC Participants.

21. Arizona claims the Additional Excess Receipts identified above and all Additional Excess Receipts held by DTC attributable to Issuers incorporated in the State of Arizona. This claim is made for the same reason and on the same basis that Arizona claims a portion of the funds already at issue in this litigation.

22. When Book Entry Certificates are issued DTC is in direct contractual relationship with the Issuer and functions as the Issuer's Paying Agent and registrar. Thus, without regard to other claims, DTC is responsible as a Paying Agent under *Texas v. New Jersey, supra*. Paying Agents presently remit owner unknown distributions to the state of incorporation.

23. The second type of Additional Excess Receipts results from bonds or debentures issued by Governmental or corporate Issuers. When the Issuer is a governmental entity, Distributions always arise in connection with municipal bonds issued to finance local governmental projects, and consist of principal and interest payments. They have never been reported or remitted to any state. They are now being demanded by New York. Pursuant to amendments to Section 300 of New York's Abandoned Property Law, which became effective April 21, 1987, distributions attributable to Governmental Issuers held on or after July 1, 1984, are now being demanded by

New York if they have not been claimed at the expiration of three years.

24. DTC and DTC Participants have never reported or remitted to any state these Additional Excess Receipts; instead, they have been lying fallow at DTC and at each and every DTC Participant. Until now, there has been no vehicle by which any state could claim and take possession of these Additional Excess Receipts paid into the Distribution System by each of the states' cities, counties and school districts.

25. Arizona claims the right to take possession of Additional Excess Receipts held by DTC and all DTC Participants attributable to Governmental Issuers. With respect to the Additional Excess Receipts held by the DTC Participants, Arizona claims that property for the same reason and on the same basis that it claims a portion of the funds already at issue in this litigation.

26. While the amount of its claim to Additional Excess Receipts held by DTC and any DTC Participants attributable to Arizona Governmental Issuers is presently unknown, Arizona estimates that amount may well be in the millions of dollars.

27. Arizona urges the Court to consider and determine the rights to claim the potentially huge amounts of Additional Excess Receipts described above. The decision of this Court with respect to the Excess Receipts already before it will conclusively and finally determine the rights of all states to take custodial possession of such Additional Excess Receipts. Such a final determination of rights should not be made without the Court's having

first considered arguments which are relevant and peculiar to the Additional Excess Receipts. Inclusion of the Additional Excess Receipts will not broaden the issues or unduly complicate the pending litigation.

28. The Additional Excess Receipts were not initially made part of this litigation because neither Delaware nor New York had any incentive to include them. DTC is incorporated in the State of New York. All Additional Excess Receipts held by DTC would therefore be remitted to New York and all Excess Receipts held by DTC Participants would go to Delaware, under the theory urged in this litigation by Delaware. Under New York's theory of this litigation, New York would take all Additional Excess Receipts and Excess Receipts from both DTC and DTC Participants. By amending its statute, New York has also poised itself to seize all Additional Excess Receipts existing in the form of municipal bond Distributions.

VII.

MERITS OF CLAIM ASSERTED AND RESOLUTION URGED BY PLAINTIFF IN INTERVENTION ARIZONA

29. In *Texas v. New Jersey, supra,* and *Pennsylvania v. New York, supra,* the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both easy to administer and equitable. The resolution urged by Arizona satisfies both criteria and is the same resolution urged by Texas. It is easy to administer, since the identity of the Issuer is always easily determined. Indeed, the identity of the Issuer is consistently

known and reflected on all sets of books and records of all parties to the securities transactions. Moreover, all DTC Participants have regional or branch offices located in every state. These branch offices already maintain a separate set of books and records for local Customers evidencing their local Customers' ownership interests and Distribution receipts. Each branch/regional office also maintains its own bank account, and is individually accountable for year-end profit and loss statements to its New York headquarters. Presently, each branch office also maintains its own "Suspense Accounts" for unclaimed Distributions. These unclaimed funds are returned to their New York headquarters and are then remitted by the DTC Participant to New York. Thus transaction records already exist on a state-by-state basis.

30. The resolution proposed by Texas and Arizona is also by far the most equitable method of distributing the unclaimed property at issue in this lawsuit. This is particularly true with respect to the Additional Excess Receipts consisting of municipal bond Distributions. It is inequitable that moneys held by DTC Participants attributable to the State of Arizona and its political subdivisions might be remitted to New York, or any state, other than the State of Arizona. It is also particularly egregious that the Additional Excess Receipts held by DTC, which clearly functions merely as a Paying Agent or registrar in these transaction, are being demanded by and will be, without this Court's intervention, remitted to New York.

31. The Excess Receipts and Additional Excess Receipts claimed herein constitute unclaimed property

arising from an unsuccessful attempt to pay a debt of the Issuer initially issuing the shares of stock, bonds, debentures and other securities instruments owed to the Beneficial Owner. Excess Receipts constitute property which is unclaimed by the Beneficial Owner. To determine the rights of various states to claim such Excess Receipts on the basis of the arguments urged by either Delaware or New York is contrary to legal precedent and unfair.

WHEREFORE, Plaintiff in Intervention State of Arizona prays:

1. That Arizona be allowed to intervene herein;

2. That Additional Excess Receipts held by the Depository Trust Company and demanded by or remitted to New York be included as part of the unclaimed property in controversy in this lawsuit;

3. That Additional Excess Receipts attributable to Governmental Issuers held by the Depository Trust Company and all DTC Participants be included as part of the unclaimed property in controversy in this lawsuit;

4. That the temporary injunction sought by Delaware with respect to the Excess Receipts already at issue herein be extended, for the reasons stated in the Complaint of Delaware, to restrain New York from demanding or taking possession of all Excess Receipts attributable to

Issuers incorporated in the State of Arizona or the Arizona Governmental Issuers;

5. That Defendant New York be restrained and enjoined from collecting any Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Arizona or attributable to Arizona Governmental Issuers, and from expending any sums collected but presently unspent, consisting of such Excess Receipts and Additional Excess Receipts, until such time as this controversy is resolved;

6. That judgment be entered that the Excess Receipts and Additional Excess Receipts held by DTC and DTC Participants attributable to Issuers incorporated in the State of Arizona or to Arizona Governmental Issuers is subject only to the claims of the State of Arizona under the Arizona Uniform Unclaimed Property Act;

7. That New York be directed to pay or deliver to Arizona all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Arizona and Arizona Governmental Issuers which have been abandoned for the applicable dormancy period under the Arizona Uniform Unclaimed Property Act;

8. That the State of Arizona be granted such other and further relief as this Court deems just.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of Arizona

IAN A. MACPHERSON
Assistant Attorney General
Chief Counsel, Tax Division
Counsel of Record

GAIL H. BOYD
Assistant Attorney General

Department of Law
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

Attorneys for the State of Arizona

April 20, 1989

No. 111 Original (12)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

Supreme Court, U.S.
FILED
APR 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

STATE OF DELAWARE,

Plaintiff,

—against—

STATE OF NEW YORK,

Defendant.

ANSWER BY THE STATE OF NEW YORK TO COMPLAINT OF THE STATE OF TEXAS

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

April 21, 1989

1784

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

ANSWER BY THE STATE OF NEW YORK TO COMPLAINT OF THE STATE OF TEXAS

The State of New York, defendant, by its counsel, for its answer to the complaint of the State of Texas, says:

1. It admits the allegation in paragraph 1 of the complaint that the State of Texas ("Texas") has invoked the original jurisdiction of this Court under article III, section 2 of the Constitution of the United States and section 1251 of title 28 of the United States Code, but denies that this Court has jurisdiction on the ground that the dispute is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. It admits the allegations in paragraph 2 of the complaint, but states that the dispute between Delaware and New York also concerns abandoned property held by New York.

3. It admits the allegations in paragraph 3 of the complaint.

4. It admits the allegations in paragraph 4 of the complaint.

5. It admits the allegations in the first sentence of paragraph 5 to the extent that the litigation at the time Texas filed its motion for leave to file a complaint in intervention involved a dispute concerning which state was entitled to the custodial taking of abandoned property ("abandoned dividends"), and denies the remainder. It denies that the definition of "Excess Receipts" in paragraph 5 is accurate except that it includes "Distributions" received by brokerage firms incorporated in Delaware for the benefit of their customers which exceed the amounts to which the brokerage firms which received the "Distributions" were entitled. It denies the allegations in the last sentence of paragraph 5, except it admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute.

6. It admits that the first two sentences of paragraph 6 accurately describe the relief which Texas is seeking, but denies that "Additional Excess Receipts" involve the same issues as "Excess Receipts." It denies the allegations in the third sentence of paragraph 6, which defines "Additional Excess Receipts" inconsistently with the definition on page 13, except that it admits that The Depository Trust Company ("DTC"), a trust company incorporated in New York, is a national clearinghouse for the settlement of trades in corporate and municipal securities and that DTC currently remits abandoned dividends owed to non-DTC participants to New York. New York also denies the accuracy of the definition on page 13 and states that the failure of Texas throughout the complaint to specify which of the two inconsistent definitions of "Additional Excess Receipts" is meant makes much of the complaint incomprehensible. It states that unclaimed principal and interest payments on municipal and

state bonds which have been made to record owners of the bonds – such as DTC, brokers, or bank personal trust departments – where the creditor has abandoned them should be routinely remitted to Texas pursuant to section 72.101 of its Property Code. In such cases, since the obligation of the issuer to pay the record owner has been satisfied, the unclaimed principal and interest payments are no longer "debt obligations attributable to corporate and Governmental Issuers." On the other hand, principal and interest payments held by paying agents of corporate and governmental issuers which have not been paid to record owners remain "debt obligations attributable to corporate and Governmental Issuers." New York does not take custody of such funds under current law although Texas may do so under section 72.101 of its Property Code and at least 33 other states have coverage which is similar to that of Texas. It denies the allegations in the fourth sentence of paragraph 6.

7. It denies the allegation in paragraph 7 that the abandoned dividends at issue in this case constitute a debt of the issuers of the underlying securities to the beneficial owners, whose claims to dividends and distributions are satisfied in the ordinary course of business by brokers. The remainder of paragraph 7 states legal conclusions to which no response is required, but if a response is required it denies the allegations. It incorporates by reference here its response to paragraph 6.

8. Paragraph 8 for the most part states legal conclusions to which no response is required, but if a response is required, it denies the allegations. It denies the allegation in the second sentence of this paragraph that under existing practice a debt of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent. A paying agent of the issuer reports unclaimed dividends which have not been paid to record owners to the state where the issuer (debtor) is incorporated when the address of the unpaid record owner (creditor) cannot be determined from the books and records of the issuer. Unclaimed funds held by record owners – such as DTC or brokers – are of an entirely different character.

9. It admits that paragraph 9 accurately characterizes the relief which Texas is seeking, but it otherwise denies the

allegations in this paragraph. It incorporates by reference here its response to paragraph 6.

10. It admits that Texas is asserting its claim pursuant to chapter 72 of the Texas Property Code, Tex. Prop. Code Ann. § 72.001 *et seq.* (Vernon Supp. 1989) ("Texas Property Code"), but states that the terms of this statute speak for themselves.

11. It admits the allegations in the first sentence of paragraph 11. It denies the allegation in the second sentence that the process by which securities distributions are made is generally understood only by persons within the "Distribution System." It denies that the two charts attached as exhibits "1" and "2" are accurate.

It denies that the definition of "Additional Excess Receipts" is accurate and incorporates by reference here its response to paragraph 6. On information and belief, it denies that "Distributions," as defined by Texas, received by DTC for its participants in transactions between its participants give rise to unclaimed funds which are deemed abandoned and turned over to the Comptroller.

It denies that the definition of "Customer" is accurate and states that "customer" is defined in section 510(6)(a) of the New York Abandoned Property Law, but admits that the definition of "Beneficial Owner" is accurate, but only if qualified in the context of this case to indicate that these economic rights to distributions are routinely satisfied by brokers on the record date and, therefore, the Beneficial Owner has no economic right against the issuer.

It admits that the definition of "Book Entry Accounting" is accurate.

It admits that the definition of "Book Entry Certificate System," to the extent it is limited to DTC, is accurate, except that physical certificates are registered for DTC only in the name of its nominee, Cede & Co., but it otherwise denies the allegations in this paragraph.

It admits that "Cede & Co." is the principal nominee used by DTC.

It admits that the description of DTC in the first two sentences of the definition is accurate but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the number of clearing houses operating in the United States. On information and belief, it denies the allegation in the third sentence of the definition of DTC to the extent that it states that DTC provides the system described by making federal wire transfers to banks for accounts of DTC participants. It admits the allegations in the fourth sentence. The last sentence is too vague to permit a response, but if a response is required it denies the allegations in this sentence. It states that brokers actively trade for themselves or their customers; DTC is owned by its members and transfers issues between its members, but does not trade. Brokers are defined in section 510(4) of New York's Abandoned Property Law and banking organizations are defined in section 103(c) of that law.

It admits that the definition, "Distributions," as used in the complaint, means dividends, profits, principal, and interest and securities representing any of the foregoing, but it otherwise denies the allegations in this paragraph.

It admits that the definition, "Distribution System," accurately describes how this term is used in the complaint.

It admits that the definition of "DTC Participant" is accurate and that all of the brokerage firms identified in Delaware's complaint are listed as DTC Participants in the December 31, 1987 DTC Annual Report.

It admits that, as used in the complaint, "Excess Receipts" means "Distributions" received by brokerage firms incorporated in Delaware for the benefit of their "Customers" which exceeds the amounts to which the brokerage firms which received the "Distributions" were entitled. It admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute. It denies the remainder of the allegations in this definition.

It denies that the description of "Ex Dividend Date" or "Ex Date" is accurate and states that the explanations in New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* 133-35 and Committee on Stockbrokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* 198-99 (1973) are recognized in the industry. New York lodged copies of these publications with the Court.

It admits that the definition of "Governmental Issuer" accurately describes how this term is used in the complaint.

It admits that "Intermediary" accurately describes how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Issuer" is accurate.

It admits that the definition of "Nominee" is generally accurate, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation that the usual form of a "Nominee" is a general partnership.

It admits that the first sentence of the description of "Paying Agent" is accurate. It denies that the second sentence of the description of "Paying Agent" is accurate. The third sentence of the description of "Paying Agent" states a legal conclusion to which no response is required. It admits the allegations in the remainder of this paragraph.

It admits that the definition of "Physical Certificate" is substantially accurate.

It admits that the description of "Physical Certificate System" accurately reflects how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Record Date" is accurate.

It admits that the definition of "Record Owner" is accurate, except that a "Beneficial Owner" is not a "Record Owner" and a "Customer" rarely is a "Record Owner."

12. Paragraph 12 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph.

13. It admits the allegations in paragraph 13.

14. It admits the allegations in paragraph 14.

15. It admits the allegations in paragraph 15.

16. It admits the allegations in paragraph 16, except that it denies that interest is paid in all cases by check mailed to the record owner by the issuer's paying agent, although this is true in most cases.

17. It admits the allegations in paragraph 17.

18. It admits the allegations in paragraph 18, except that it denies, on information and belief, the allegations in the fourth sentence of this paragraph to the extent that they state that DTC participants deal with each other by re-registering all physical certificates in the name of Cede & Co. and by depositing all these physical certificates at DTC.

19. It admits the allegations in paragraph 19, but is without knowledge or information sufficient to form a belief as to the truthfulness of the percentage of new issues in which physical certificates are available to customers.

20. It admits the allegations in the first sentence of paragraph 20, but the remainder of the paragraph states legal conclusions to which no response is required, but if a response is required it denies the allegations in the remainder of the paragraph. The pleadings and briefs of Delaware and New York speak for themselves.

21. Paragraph 21 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The complaint and motion for leave to file a complaint of Delaware speak for themselves.

22. Paragraph 22 states legal conclusions to which no response is required, but if a response is required New York's position is that the abandoned property which Delaware claims consists mainly of dividend and interest overpayments owed by one broker ("debtor broker") to another broker or bank ("creditor broker"). They are not owed to the customers (beneficial owners) of creditor brokers because the customers have been fully satisfied by creditor brokers and, therefore, have no right to claim these overpayments. The majority of these creditor brokers have trading addresses in New York. The answer and brief in opposition to the motion for leave of New York speak for themselves.

23. Paragraph 23 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The pleadings and briefs of the parties speak for themselves.

24. Paragraph 24 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. This Court's decisions speak for themselves.

25. It admits the allegations in the first sentence of paragraph 25 of the complaint. The second sentence does not require a response, but if a response is required it denies the allegations in that sentence.

26. On information and belief, it denies the allegations in paragraph 26 except, on information and belief, it admits that generally trades of physical certificates between DTC participants occur on the books and records of DTC.

27. On information and belief, it admits the allegations in the first sentence of paragraph 27, except it denies that there are no circumstances in which DTC might have legal ownership rights in the physical certificates. It denies the allegations in the second sentence of paragraph 27.

28. It admits the allegations in the first sentence of paragraph 28 except it states on information and belief that purchases of securities held at DTC are also made through firms other than brokerage firms who are, or act through, DTC

participants. It denies on information and belief the allegations in the second sentence to the extent that they suggest that all these purchases are made in book entry form only. It denies on information and belief the allegations in the third sentence to the extent that they suggest "customers" may never receive physical certificates from the issuer or from DTC participants. It denies on information and belief the allegations in the fourth sentence of paragraph 28 except that it admits that each "Customer" may maintain account at a DTC participant or other brokerage firm. It denies on information and belief the allegations in the fifth sentence of paragraph 28 except that it admits that, in some cases, the books and records of the DTC participant or other brokerage firm may constitute the only evidence of each "Customer's" legal ownership. It denies on information and belief the allegations in the sixth sentence of paragraph 28 except that it admits that when "Customers" purchase beneficial ownership from a DTC participant or other brokerage firm, it may send its "Customers" transaction statements confirming and setting forth the terms of the purchase. It admits the allegations in the seventh sentence of paragraph 28. The last sentence of paragraph 28 states legal argument to which no response is required, but if a response is required it denies on information and belief the allegations in that sentence.

29. It admits the allegations in the first two sentences of paragraph 29. It denies on information and belief the allegations in the last sentence of paragraph 29.

30. It admits the allegations in the first four sentences of paragraph 30, except it denies on information and belief the allegations in the third sentence to the extent that they state that the books and records of DTC evidence the amount and identity of physical certificates which are held by DTC participants. It denies on information and belief the allegation in the last sentence of that paragraph that there are three sets of "Record Owners" for the same securities.

31. It admits on information and belief the allegations in the first sentence of paragraph 31. It denies on information and belief the allegations in the second sentence of paragraph 31

to the extent that they state that each distribution received by DTC is allocated on "Ex Date." It admits on information and belief the allegations in the third and fourth sentences of paragraph 31. It denies on information and belief the allegations in the fifth sentence of this paragraph. It denies the allegations in the sixth sentence of this paragraph to the extent that they state that customers must wait until their brokers receive distributions in order to be paid.

32. It admits the allegations in paragraph 32, except denies on information and belief the allegations to the extent that they state that there are three sets of books and records which indicate record ownership.

33. It denies the allegations in the first sentence of paragraph 33 to the extent that they suggest that brokers credit their customer accounts after receiving dividends from DTC. It denies the allegations in the remainder of the paragraph.

34. It denies on information and belief that the example in paragraph 34 accurately describes a typical transaction between two DTC participant brokers which gives rise to unclaimed abandoned dividends.

35. It denies on information and belief that the allegations in the first five sentences accurately describe the method of settling transactions between DTC participants. It admits the allegation in the final sentence of paragraph 35.

36. The first sentence of paragraph 36 does not require a response, but if a response is required it denies the allegations in the first sentence. It admits the allegations in remainder of that paragraph.

37. It admits the allegations in the first sentence of paragraph 37 except it denies on information and belief the allegations concerning the method of payment. It admits the allegations in the remainder of paragraph 37, except it denies on information and belief the allegation in the last sentence of that paragrapn that the records of the issuer, DTC, and "DTC Participants" each reflect a different "Record Owner."

38. It denies on information and belief the allegations in the first sentence of paragraph 38. It admits the allegations in the second sentence of that paragraph. It denies the allegations in the last sentence of paragraph 38 except that it admits that in some cases abandoned dividends include physical certificates registered to Cede & Co., but usually such certificates are registered in the name of the broker.

39. It denies the allegations in the first sentence of paragraph 39 except it admits that DTC and DTC participants may function as agents of the "Beneficial Owner." It admits DTC has not claimed any legal ownership interest in the dividend overpayments at issue in this case, but denies that DTC participants have not claimed any interest to abandoned dividends in the custody of the New York State Comptroller. It denies that brokerage firms are neither creditors nor debtors with respect to abandoned dividends in the custody of the Comptroller. The fourth sentence states legal argument to which no legal response is required, but if a response is required it denies the allegations in that sentence.

40. It denies the allegations in paragraph 40.

41. It denies the allegations in the first sentence of paragraph 41 except that it admits that Delaware identified 15 DTC participants. It admits the allegations in the second and third sentences of paragraph 41. It denies the allegations in the fourth sentence of paragraph 41. It admits the allegations in the fifth and sixth sentences accurately describe the claim Texas is making in this case, but denies that Texas is entitled to any of the abandoned property claimed.

42. The first sentence of paragraph 42 states legal argument to which no response is required, but if a response is required it denies the allegations in that sentence. It denies the allegations in the second sentence of that paragraph.

43. It admits the allegations in paragraph 43 accurately describe the claim that Texas is making in this case, but denies that it should be considered by this Court and incorporates by reference here its response to paragraph 6.

44. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the first and second sentences of paragraph 44. The third sentence of that paragraph is too vague to call for a response, but if a response is required it denies the allegations in the third sentence. It incorporates by reference here its response to paragraph 6.

45. It denies the allegations in the first sentence of paragraph 45. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of the paragraph, except that it admits that DTC denied Texas access to its books and records. The allegations in the third and fourth sentences of paragraph 45 are legal argument to which no response is required, but if a response is required it denies the allegations in those sentences. It admits that a copy, with typographical errors, of the November 28, 1988 letter of Patricia Trainor is attached to the complaint, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

46. It denies on information and belief the allegations in the first sentence of paragraph 46 except to the extent that it admits the letter describes the "Cede Float." It admits the allegations in the remainder of the paragraph, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

47. It denies that the quotation in the first sentence of paragraph 47 is accurate and states that the contents of the letter speak for themselves. It admits the allegations in the second sentence of paragraph 47 to the extent that it states that funds in the "Unclaimed Dividends" account do not belong to DTC, but denies on information and belief the remainder of the allegations in that sentence. It admits the allegations in the third sentence of paragraph 47 to the extent that funds remaining in the "Unclaimed Dividends" account after three years that are deemed abandoned are remitted to New York, and denies the remainder, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

48. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the first sentence of paragraph 48 concerning the sufficiency of the information provided by DTC to Texas. It admits the allegations in the second sentence of paragraph 48, except that it denies the amount attributable to Texas issuers is $32,511 and the period covered is correctly stated and states that the correct amount is $32,514 and the period covered is from July 31, 1981 through June 30, 1982. It admits the allegations in the first two sentences of footnote 7 of paragraph 48. It admits the allegations in the third sentence of footnote 7 of paragraph 48 that the Texas Treasury asked New York for a complete copy of an annual unclaimed property report filed by DTC for any one year between 1978 and 1985 and states that on August 8, 1986, New York sent a copy to Texas of sample pages from such a report. It admits the allegations in the fourth sentence of footnote 7 of paragraph 48. It denies the allegations in the fifth sentence of footnote 7 of paragraph 48. It incorporates by reference here its response to paragraph 6.

49. It admits that the allegations in the first sentence of paragraph 49 accurately state the claims Texas is making in the complaint, but otherwise denies the allegations in the first sentence. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of paragraph 49. It incorporates by reference here its response to paragraph 6.

50. It denies on information and belief the allegations in the first two sentences of paragraph 50 and states that DTC is not a paying agent for issuers including any of the issuers listed in the Patricia H. Trainor letter attached as Exhibit 3 to the complaint. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the last sentence of paragraph 50.

51. It denies the allegations in the first four sentences of paragraph 51 and incorporates by reference here its response to paragraph 6. It denies the allegations in the fifth sentence of paragraph 51 except that it admits that it is enforcing the

amendments to section 300 of the New York Abandoned Property Law which became effective April 21, 1987. It incorporates by reference here its response to paragraph 6.

52. It denies the allegations in paragraph 52 and incorporates by reference here its response to paragraph 6.

53. It admits that paragraph 53 accurately states the position of Texas, but it otherwise denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

54. Paragraph 54 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

55. The first three sentences of paragraph 55 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies that inclusion of the claim to "Additional Excess Receipts" will not broaden the issues or unduly complicate the pending litigation. It incorporates by reference here its response to paragraph 6.

56. Paragraph 56 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

57. The first two sentences of paragraph 57 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies the allegations in the third and fourth sentences of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the fifth sentence of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the remainder of paragraph 57 concerning how each office of DTC participant operates or whether each DTC participant has offices in each state, but admits that these allegations describe typical branch or regional offices.

58. Paragraph 58 states legal conclusions to which no response is required except that New York denies on information and belief that DTC functions as a paying agent or registrar and it admits that several states have informally supported the Texas motion to intervene. If any further response is required it denies any other allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

59. Paragraph 59 states legal argument to which no response is required, except that New York denies that persons do not make claims for "Excess Receipts," and if any further response is required, it denies the remaining allegations in that paragraph.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. Texas has failed to exhaust administrative remedies.

3. Texas' claims are barred by laches and waiver.

4. Texas has failed to state a claim upon which relief can be granted.

5. Under existing law, Texas is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined.

WHEREFORE, this Court should enter judgment dismissing the complaint by the State of Texas.

Dated: New York, New York
April 21, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Counsel

MOTION FILED
APR 21 1989

No. 111 Original

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

v.

STATE OF NEW YORK, Defendant

MOTION OF THE STATE OF CONNECTICUT FOR LEAVE TO INTERVENE

CLARINE NARDI RIDDLE
Acting Attorney General
of Connecticut

WILLIAM J. PRENSKY
Assistant Attorney General
Counsel of Record

JANE D. COMERFORD
Assistant Attorney General

110 Sherman Street
Hartford, Connecticut 06105
(203) 566-4899

Attorneys for the State of Connecticut

39 pp

Printed by

Brescia's Printing Services, Inc.
66 Connecticut Boulevard
East Hartford, CT 06108
528-4264

TABLE OF CONTENTS

Page

MOTION OF THE STATE OF CONNECTICUT FOR LEAVE TO INTERVENE 1

APPENDIX:

Exhibit A — Connecticut Escheats Law 1A

TABLE OF AUTHORITIES

Cases: **Page(s)**

Pennsylvania v. New York, 407 U.S. 206 (1972) 5

Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961) 5

Statutes:

Connecticut Escheats Law, Conn. Gen. Stat. § 3-56 (1989), *et seq.* 3

Federal Rules of Civil Procedure:

Fed. R. Civ. Pro. 24(a)(2) 4

Fed. R. Civ. Pro. 24(b) 4

No. 111 Original

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

v.

STATE OF NEW YORK, Defendant

MOTION OF THE STATE OF CONNECTICUT FOR LEAVE TO INTERVENE

No. 111 Original

In The

Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

v.

STATE OF NEW YORK, Defendant

MOTION OF THE STATE OF CONNECTICUT FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Connecticut, a sovereign state of the United States of America, by and through Acting Attorney General Clarine Nardi Riddle, moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting it to adopt, to the extent appropriate, the Complaint in Intervention and Brief in Support of Motion for Leave to File heretofore filed by the State of Texas, Plaintiff in Intervention. In support of this motion, the State of Connecticut would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("Excess Receipts"),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

4. As set forth in detail in its Complaint, Texas claims a portion of the Excess Receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of Excess Receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to Issuers incorporated in Texas.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to Issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts which have arisen in connection with Distributions made by Texas municipal and other governmental Issuers ("Additional Excess Receipts") which are now being demanded by or remitted to New York. It is the understanding

[1] In its Complaint in Intervention, Texas has defined certain terms. The State of Connecticut incorporates those definitions herein by reference.

of the State of Connecticut ("Connecticut") that the Court intends to consider claims to both the Excess Receipts originally at issue and the Additional Excess Receipts identified by Texas.

6. Texas claims a portion of the Excess Receipts and the Additional Excess Receipts for the reason that they constitute a debt owed by the Issuer to the securities' Beneficial Owner. If the identity of the Beneficial Owner is unknown, the Excess Receipts and Additional Excess Receipts should be remitted to the state of incorporation of the Issuer under the state's unclaimed property law.

7. Connecticut claims a portion of the Excess Receipts and Additional Excess Receipts at issue in this action, specifically, that portion of the Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Connecticut and that portion attributable to Connecticut municipalities and other governmental entities.

8. The amount of Excess Receipts and Additional Excess Receipts that Connecticut is entitled to claim is presently unknown. Connecticut has never, prior to this lawsuit, had any reason to identify and quantify such Excess Receipts and Additional Excess Receipts. However, it is probable that at least one Issuer incorporated in Connecticut has generated Excess Receipts and Additional Excess Receipts. Moreover, it is a virtual certainty that bonds issued by Connecticut municipalities and other governmental entities have generated Additional Excess Receipts subject to the claim of Connecticut.

9. Connecticut asserts its claim pursuant to Conn. Gen. Stat. § 3-56 (1989) *et seq.*, which provides, in essence, for the custodial taking of abandoned or unclaimed tangible or intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property and no claim to said property has been asserted within the applicable dormancy period, which for most types

of personal property is three years. Connecticut's escheats law is set forth in Exhibit A to Connecticut's Motion for Leave to Intervene.

10. Connecticut supports and adopts as if fully set forth by Connecticut in its own pleadings Texas' Complaint in Intervention and Brief in Support of Motion for Leave to File, and the factual and legal arguments set forth therein, to the extent same are applicable and relevant to the claims of Connecticut set forth in Paragraph 7 above.

11. Although Connecticut adopts the Complaint in Intervention filed by Texas, it is essential that Connecticut be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law which will conclusively determine the future right of Connecticut to claim and take possession of unclaimed property similar or identical in nature to the Excess Receipts and Additional Excess Receipts at issue herein. Additionally, if Connecticut is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in Connecticut. As a party, Connecticut can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to Connecticut.

12. Based on the foregoing, Connecticut is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Connecticut urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of Connecticut in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that

it can do so, Texas has offered to serve as lead counsel for those states, including Connecticut, wishing to intervene and represent themselves in this case. The addition of Connecticut as a Plaintiff in Intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. The Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. See, also, *Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claim that Connecticut seeks by urging this Court to grant leave to intervene herein.

Wherefore, Connecticut prays that it be permitted to intervene as a party plaintiff in this case, and to adopt, as its own and as if fully set forth by Connecticut in its own pleadings, Texas' Complaint in Intervention and Brief in Support of the Motion for Leave to File, and the factual and legal arguments set forth therein, to the extent same are relevant and applicable to the claims of Connecticut; alternatively, Connecticut prays that it be permitted to file its own Complaint in Intervention setting forth the factual and legal arguments asserted by Texas in its Complaint and seeking, on behalf of Connecticut, relief of the same nature as Texas.

Respectfully submitted,

CLARINE NARDI RIDDLE
Acting Attorney General
of Connecticut

WILLIAM J. PRENSKY
Assistant Attorney General
Counsel of Record

JANE D. COMERFORD
Assistant Attorney General

110 Sherman Street
Hartford, Connecticut 06105
(203) 566-4899

Attorneys for the State
of Connecticut

No. 111 Original

In The
Supreme Court Of The United States

OCTOBER TERM, 1988

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

v.

STATE OF NEW YORK, Defendant

APPENDIX
Exhibit A

INDEX

TITLE 3. STATE ELECTIVE OFFICERS
CHAPTER 32. TREASURER
PART III. ESCHEATS

Section		Page
3-56	Definitions	4A
3-56a	Definitions	4A
3-57	Escheat of property unclaimed or unused for seven years	5A
3-57a	Property held by banking organization presumed abandoned, when	5A
3-58	Sale of escheated property	6A
3-58a	Funds held by life insurance corporation presumed abandoned, when	6A
3-59	Petition in case of interest in escheated property. Appeal	7A
3-59a	Property held by a business association presumed abandoned, when	7A
3-59b	Ownership held by a business association presumed abandoned, when	8A
3-59c	Duties of holder of abandoned interests in business associations	8A
3-59d	Delivery of duplicate certificate to treasurer. Holder relieved of liability to others upon such delivery	8A

3-60	Examination of witnesses	9A
3-60a	Property distributable on dissolution of business presumed abandoned, when. Notice to shareholder of corporate dissolution or liquidation	9A
3-61	Action against custodian of property	9A
3-61a	Property held by fiduciary presumed abandoned, when	10A
3-62	Application of provisions	10A
3-62a	Property held by public body or officer presumed abandoned, when	10A
3-62b	Property held by federal court or agency presumed abandoned, when	10A
3-62c	Proceedings to recover property	13A
3-62d	Action to obtain decree of escheat	13A
3-62e	Treasurer to pay costs and deposit funds into general fund	14A
3-62f	Claim for return of escheated property	14A
3-62g	Liability of state	15A
3-63	Notice of inactive bank accounts. Index. Interest. Escheat.	15A
3-63a	Property in decedent's estate presumed abandoned, when	15A
3-64	Escheating of trust funds held by treasurer	15A
3-64a	Property presumed abandoned generally	16A

3-65	Conversion of escheated property into cash	16A
3-65a	Duties of holder of abandoned property	16A
3-65b	Assessment of interest penalty for failure to report or deliver abandoned property as required	18A
3-66	Escheat of unclaimed life insurance company funds. Definitions.	18A
3-66a	Notice by treasurer	18A
3-66b	Unclaimed intangible property. Conditions raising presumption of abandonment	19A
3-67	When funds escheat	20A
3-67a	State responsibility for property. Reimbursement of prior holder for payment to holder. Reimbursement of holder compelled to register transfer of original certificate	20A
3-68	Report of unclaimed funds	21A
3-68a	Sale of property by treasurer	21A
3-69	Notice	23A
3-69a	Disposition of funds by treasurer	23A
3-70	Payment to treasurer	24A
3-70a	Claims for abandoned property	24A
3-71	State to assume custody and liability	25A
3-71a	Appeals	25A
3-72	Funds to be paid to general fund and special trust fund	25A
3-72a	Escheat proceedings	25A
3-73	Claim. Appeal. Bond	27A
3-73a	Excepted property	27A
3-73b	Effect of expiration of limitation periods	28A
3-74	Payment of claim	28A
3-74a	Rules and regulations	28A
3-75 and 3-76	Record to be kept by treasurer	29A

TITLE 3. STATE ELECTIVE OFFICERS
CHAPTER 32. TREASURER
PART III. ESCHEATS

Sec. 3-56. Definitions. Section 3-56 is repealed.

Sec. 3-56a. Definitions. As used in this part, unless the context otherwise requires: "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to the property held, issued or owing by the holder; "banking organization" means any state bank and trust company, national banking association or savings bank engaged in business in this state; "business association" means any private corporation, joint stock company, business trust, partnership or any association for business purposes of two or more individuals; "financial organization" means any savings and loan association, credit union or investment company; "holder" means any person in possession of property subject to this part which belongs to another, or who is trustee in case of a trust, or who is indebted to another on an obligation subject to this part; "last-known address" means a description of the location of the apparent owner sufficient for the purpose of delivery of mail; "life insurance corporation" means any association or corporation transacting the business of insurance on the lives of persons or insurance appertaining thereto, including, but not limited to, endowments and annuities; "owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this part, or his legal representative; "person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity; "property" means realty or personalty, tangible or intangible; and "treasurer" means the treasurer of the state of Connecticut.

Sec. 3-57. Escheat of property unclaimed or unused for seven years. Section 3-57 is repealed.

Sec. 3-57a. Property held by banking organization presumed abandoned, when. The following property held or owing by a banking or financial organization is presumed abandoned unless the owner thereof is known to be living by an officer of such organization:

(1) Any demand, savings or matured time deposit made in this state with a banking organization, together with any interest or dividend thereon, excluding any charges that lawfully may be withheld, unless the owner has, within ten years: (A) Increased or decreased the amount of the deposit, or presented the passbook or other similar evidence of the deposit for the crediting of interest; or (B) corresponded in writing with the banking organization concerning the deposit; or (C) otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization.

(2) Any funds paid in this state toward the purchase of shares or other interest in a financial organization or any deposit made therewith, and any interest or dividends thereon, excluding any charges that lawfully may be withheld, unless the owner has within ten years: (A) Increased or decreased the amount of the investment or deposit, or presented an appropriate record for the crediting of interest or dividends thereon; or (B) corresponded in writing with the financial organization concerning the investment or deposit; or (C) otherwise indicated an interest in the funds as evidenced by a memorandum on file with the financial organization.

(3) Any sum payable on checks certified in this state or on written instruments issued in this state on which a banking or financial organization is directly liable, including, by way of illustration but not of limitation, certificates of

deposit, money orders, drafts and traveler's checks, which, with the exception of traveler's checks, has been outstanding for more than five years from the date payable, or from the date of its issuance if payable on demand, or, in the case of traveler's checks, which has been outstanding for more than fifteen years from the date of issuance, unless the owner has within such five or fifteen years, as the case may be, corresponded in writing with the banking or financial organization concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization.

(4) Any funds or other personal property reposing in or removed from a safe deposit box or any other safekeeping repository in this state on which the lease or rental period has expired owing to nonpayment of rent or other reason, or any surplus amounts arising from the sale thereof pursuant to law, excluding any charges that lawfully may be withheld, which have been unclaimed by the owner for more than ten years from the date on which the lease or rental period expired.

Sec. 3-58. Sale of escheated property. Section 3-58 is repealed.

Sec. 3-58a. Funds held by life insurance corporation presumed abandoned, when. (a) Unclaimed funds held and owing by a life insurance corporation shall be presumed abandoned if a person other than the insured or annuitant is entitled to the funds and no address of such person is known to the corporation. If it is not definite and certain from the records of the corporation what person is entitled to the funds, it is presumed that the last-known address of the person entitled to the funds is the same as the last-known address of the insured or annuitant according to the records of the corporation.

(b) As used in this section, "unclaimed funds" means all moneys held and owing by any life insurance corporation unclaimed and unpaid for more than five years after the moneys became due and payable as established from the records of the corporation under any life or endowment insurance policy or annuity contract which has matured or terminated. A life insurance policy not matured by actual proof of the death of the insured is deemed to be matured and the proceeds thereof are deemed to be due and payable if such policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based, unless the person appearing entitled thereto has within the preceding five years (1) assigned, readjusted or paid premiums on the policy, or subjected the policy to loan, or (2) corresponded in writing with the life insurance corporation concerning the policy. Moneys otherwise payable according to the records of the corporation are deemed due and payable although the policy or contract has not been surrendered as required.

Sec. 3-59. Petition in case of interest in escheated property. Appeal. Section 3-59 is repealed.

Sec. 3-59a. Property held by a business association presumed abandoned, when. (a) Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder or other security holder, or a participating patron of a cooperative, who has not claimed it or corresponded in writing with the business association concerning it within seven years after the date prescribed for payment or delivery, is presumed abandoned.

(b) Any sum payable on a traveler's check issued or sold in this state on which a business association is directly liable, which has been outstanding for more than fifteen years from

the date of its issuance is presumed abandoned, unless the owner has within fifteen years corresponded in writing with the business association concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with such business association.

Sec. 3-59b. Ownership interest in business association presumed abandoned, when. Any ownership interest in a business association, as defined in section 3-56a, as evidenced by the stock records or membership records of the business association, owned by a person who for more than seven years has neither claimed a dividend or other sum referred to in section 3-59a, nor corresponded in writing with the association, nor otherwise indicated an interest in such ownership interest as evidenced by a memorandum or other record on file with the association, is presumed abandoned.

Sec. 3-59c. Duties of holder of abandoned interests in business associations. When the property to be delivered to the treasurer pursuant to the provisions of section 3-56a is an ownership interest in a business association presumed abandoned under section 3-59b, the holder shall deliver a duplicate certificate of such interest, registered in the name of the treasurer, to the treasurer if such a certificate is the customary evidence of such interest and, if the ownership interest is not customarily evidenced by a certificate, the holder shall deliver such evidence of such ownership interest as the treasurer may by regulation require.

Sec. 3-59d. Delivery of duplicate certificate to treasurer. Holder relieved of liability to others upon such delivery. Upon delivery of a duplicate certificate, the holder and any transfer agent, registrar or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate shall be relieved of all liability of every kind in accordance with the provisions of subsection (c) of section

3-67a to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the transferee, for any losses or damages resulting to any person by the issuance and delivery to the treasurer of the duplicate certificate.

Sec. 3-60. Examination of witnesses. Section 3-60 is repealed.

Sec. 3-60a. Property distributable on dissolution of business presumed abandoned, when. Notice to shareholder of corporate dissolution or liquidation. (a) All property distributable in the course of a voluntary or involuntary dissolution or liquidation of an unincorporated business, banking or financial organization created under the laws of this state which is unclaimed by the owner at the date of final dissolution or liquidation is presumed abandoned.

(b) All property distributable in the course of a voluntary or involuntary dissolution or liquidation of a corporation pursuant to the provisions of title 33 which is unclaimed by the owner at the date of final dissolution or liquidation is presumed abandoned.

(c) Notice given by certified or registered mail to any shareholder of a corporation voluntarily or involuntarily dissolved or liquidated during the course of such dissolution or liquidation shall be deemed to be sufficient notice under the provisions of this part.

Sec. 3-61. Action against custodian of property. Section 3-61 is repealed.

Sec. 3-61a. Property held by fiduciary presumed abandoned, when. All property and any income or increment thereon held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within seven years after it became payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing with the fiduciary concerning the property or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary.

Sec. 3-62. Application of provisions. Section 3-62 is repealed.

Sec. 3-62a. Property held by public body or officer presumed abandoned, when. All property held for the owner by any court, public corporation, public authority or public officer of this state, or a political subdivision thereof, which has remained unclaimed by the owner for more than five years is presumed abandoned, except that any claim granted pursuant to chapter 53 in an amount less than three thousand dollars which has remained unclaimed by the owner for more than one year from the date such claim was granted is presumed abandoned.

Sec. 3-62b. Property held by federal court or agency presumed abandoned, when. All property within the provisions of subdivisions (1), (2), (3), (4) and (5) of this section are declared to have escheated, or to escheat, including all principal and interest accruing thereon, and to be the property of the state.

(1) All money or other property which has remained in, or has been deposited in the custody of, or under the control of, any court of the United States, in and for any district within this state, or which has been deposited with and is in the custody of any depository, registry, clerk or other officer

of such court, or the United States Treasury, the rightful owner or owners of which either: (A) Have been unknown for a period of five or more consecutive years; or (B) have died, without having disposed thereof, and without having left heirs, next of kin or distributees; or (C) have made no demand for such money or other property for five years; is declared to have escheated, or to escheat, together with all interest thereon, and to be the property of the state.

(2) After October 1, 1969, all money or other property which has remained in, or has been deposited in the custody of, or under the control of, any court of the United States, in and for any district within this state, for a period of four years, the rightful owner or owners of which, either: (A) Have been unknown for a period of four years; or (B) have died without having disposed thereof, and without having left heirs, next of kin or distributees; or (C) have failed within four years to demand the payment or delivery of such funds or other property; is declared to have escheated, or to escheat, together with all interest accrued thereon, and to be the property of the state.

(3) All money or other property which has remained in, or has been deposited in the custody of, or under the control of any officer, department or agency of the United States for five or more consecutive years, which money or other property had its situs or source in this state, except as hereinafter provided in subdivision (4) of this section, the sender of which is unknown, or who sent the money or other property for an unknown purpose, or money which is credited as "unknown," and which such government office, department or agency is unable to credit to any particular account, or the sender of which has been unknown for a period of five or more consecutive years, or, if known, has died without having disposed thereof, and without leaving heirs, next of kin or distributees, or which for any reason is unclaimed from such governmental agency, is declared to have escheated, or to escheat, together with all interest accrued thereon, and to be the property of the state.

(4) If any money is due to any resident of this state as a refund, rebate or tax rebate from the United States Commissioner of Internal Revenue, the United States Treasurer or any other federal agency or department and the rights of such resident to apply for and secure such refund or rebate will or may be barred by any statute of limitations or, in any event, if such resident has failed to apply for such refund or rebate for a period of one year after he could have so applied, the state treasurer is appointed agent of such resident to apply for such refund or rebate, and may do any act which a natural person could do to recover such money, and when the treasurer files such application or institutes any other proceeding to secure such refund or rebate, his agency is coupled with an interest in the money sought and money recovered.

(5) Sections 3-62b to 3-62g, inclusive, are applicable to all funds or other property in the possession of the government of the United States, and of its departments, officers and agencies, which property has its situs in this state or which belonged or belongs to a resident of this state or which belonged or belongs to a person whose last-known address was within this state, and is not limited to any named federal agency. Said sections are applicable to all funds held in the Veterans' Administration, Comptroller of Currency, United States Treasury, Department of Internal Revenue, Post Office Department, federal courts and registry of federal courts, and to such evidences of indebtedness as adjusted service bonds, matured debts issued prior to 1917, together with interest thereon, postal savings bonds, liberty bonds, victory notes, Treasury bonds, Treasury notes, certificates of indebtedness, Treasury bills, Treasurer's savings certificates, bonuses and adjusted compensation, allotments, postal savings certificates, Farmers Home Administration notes, and all unclaimed refunds or rebates of whatever kind or nature, which are subjects of escheat, under the terms of said sections; provided nothing in said sections shall be construed to mean that any funds held or controlled by the United States on October 1, 1969, under order of any court of the United States shall become property of the state.

Sec. 3-62c. Proceedings to recover property. (a) When there exists, or may exist escheated funds or property under sections 3-62b to 3-62g, inclusive, the treasurer shall make demand therefor or request the attorney general to institute proceedings in the name of the state for an adjudication that an escheat to the state of such funds or property has occurred; and shall take appropriate action to recover such funds or property.

(b) Where there exists, or may exist, escheated funds or property under said sections, the treasurer may request that any officer, department or agency of the United States voluntarily report such information as may be necessary to claim such funds or property under said sections. Forms for so reporting may be prescribed by the treasurer. If any officer, department or agency of the United States fails or refuses to provide the voluntary report so requested, the treasurer shall request that the attorney general institute proceedings in the name of the state to obtain the required information.

Sec. 3-62d. Action to obtain decree of escheat. Whenever the treasurer is of the opinion that an escheat has occurred, or shall occur, of any money or other property deposited in the custody of, or under the control of, any court of the United States, in and for any district within the state, or in the custody of any depository, registry or clerk or other officer of such court, or the Treasury of the United States, he may request that the attorney general cause a complaint to be filed in the superior court for the judicial district of Hartford-New Britain, or in any other court of competent jurisdiction, to ascertain if any escheat has occurred, and to cause said court to enter a judgment or decree of escheat in favor of the state, with costs, disbursements and attorneys' fees. Notice of the filing of any such action may be given to interested persons by publication of a notice to be published at least once a week for two successive weeks in a newspaper of general circulation in the county in which is located the last-known address of any such interested person or, if unknown, in a newspaper of general circulation in the judicial district of Hartford-New Britain.

Sec. 3-62e. Treasurer to pay costs and deposit funds into general fund. When any funds or property which have escheated under sections 3-62b to 3-62g, inclusive, have been recovered by the treasurer, he shall pay all costs incident to the collection and recovery of such funds and property and shall promptly deposit the balance of such funds or property into the general fund for the use of the state.

Sec. 3-62f. Claim for return of escheated property. (a) Any person who claims any property, funds or money delivered to the state treasurer under sections 3-62b to 3-62g, inclusive, shall, within five years from the date of receipt of such property, funds or money by the treasurer, file a verified claim with the treasurer, setting forth the facts upon which such party claims to be entitled to recover such money or property. All claims made for recovery of property, funds or money, not filed within five years from the date such property, funds or money is received by the state treasurer, shall be forever barred, and said treasurer shall be without power to consider or determine any claims so made by any claimant after five years from the date that the property, funds or money was received by the state treasurer.

(b) The treasurer shall consider each claim within ninety days after it is filed. He may hold hearings on any claim and he may refer any claim to the claims commissioner, who shall hold hearings thereon and promptly return his recommendations for payment or rejection thereof. The treasurer shall deliver his decision in writing on each claim heard, with a finding of fact and a statement of the reasons for his decision. No claim under this section shall be allowed except upon written approval of the attorney general. The treasurer shall pay each claim allowed from the general fund, without deduction for costs or service charges. He shall notify the commissioner of revenue services of the payment of claims of five hundred dollars or more to the domiciliary administrator or executor of a deceased owner.

(c) Any person aggrieved by a decision of the state treasurer may appeal therefrom in accordance with the provisions of section 4-183, except venue for such appeal shall be in the judicial district of Hartford-New Britain. If an appeal is taken without probable cause, the court may tax double or triple costs against the appellant, as the case demands.

Sec. 3-62g. Liability of state. Upon the payment or delivery of money or other property to the treasurer under sections 3-62b to 3-62g, inclusive, the state shall assume custody and shall be responsible for all claims thereto. If, after payment or delivery to the treasurer, any officer, department or agency of the federal government is compelled by a court of competent jurisdiction to make a second payment, the treasurer, upon proof thereof, shall refund the amount of such second payment not in excess of the amount paid over to him under said sections, provided the federal government shall give notice to the treasurer of the pendency of any such proceeding seeking payment of funds already turned over to the treasurer.

Sec. 3-63. Notice of inactive bank accounts. Index. Interest. Escheat. Section 3-63 is repealed.

Sec. 3-63a. Property in decedent's estate presumed abandoned, when. Any property of a deceased person which remains unclaimed by the person or persons entitled thereto for five years after the settlement of the estate is presumed abandoned; provided all claims of interest in such property shall remain subject to the further order of the probate court during the period limited by section 3-70a.

Sec. 3-64. Escheating of trust funds held by the treasurer. Section 3-64 is repealed.

Sec. 3-64a. Property presumed abandoned generally. All property not otherwise provided for or excluded from this part, including any income, interest or other increment thereto and deducting any lawful charges, which is held or owing in this state and has remained unclaimed by the owner for more than three years after it became due, payable or distributable, is presumed abandoned.

Sec. 3-65. Conversion of escheated property into cash. Section 3-65 is repealed.

Sec. 3-65a. Duties of holder of abandoned property. (a) Within one year before a presumption of abandonment is to take effect in respect to any property and if the owner's claim is not barred by law, the holder shall notify the owner thereof, by first class mail directed to the owner's last-known address, that evidence of interest must be indicated as required by this part or such property will be transferred to the treasurer and will be subject to escheat to the state.

(b) Within ninety days after the close of the calendar year in which property is presumed abandoned, the holder shall pay or deliver such property to the treasurer and file, on forms which the treasurer shall provide, a report of unclaimed property. Each report shall be verified and shall include: (1) The name, if known, and last-known address, if any, of each person appearing to be the owner of such property; (2) in case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and beneficiary and his last-known address appearing on the life insurance corporation's records; (3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due except that the holder shall report in the aggregate items having a value of twenty-five dollars or less; (4) the date when the property became payable, demandable or returnable and the date of the last transaction with the owner with respect to the property; (5) if the holder is a

successor to other holders, or if he has changed his name, all prior known names and addresses of each holder of the property, and (6) such other information as the treasurer may require.

(c) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(d) The treasurer shall keep a permanent record of all reports submitted to him.

(e) No owner shall be entitled to any interest, income or other increment which may accrue to property presumed abandoned from and after the date of payment or delivery to the treasurer.

(f) The treasurer may decline to receive any property the value of which is less than the cost of giving notice or holding sale, or he may postpone taking possession until a sufficient sum accumulates.

(g) The treasurer, or any officer or agency designated by him, may examine any person on oath or affirmation, or the records of any person, who he has reason to believe has knowledge of or has failed to report or transmit property presumed abandoned. The treasurer may bring an action in a court of appropriate jurisdiction to enforce the provisions of this part.

(h) Upon request of the holder, the treasurer may approve the aggregate reporting on an estimated basis of two hundred or more items in each of one or more categories of unclaimed funds whenever it appears to him that each of the items in any such category has a value of more than ten dollars but less than twenty-five dollars and the cost of reporting such items would be disproportionate to the amounts involved. Any holder electing to so report any such category in the aggregate shall assume responsibility for any valid claim presented within twenty years after the year in which the items in such category are presumed abandoned.

Sec. 3-65b. Assessment of interest penalty for failure to report or deliver abandoned property as required. Any person who fails to report or deliver abandoned property within the time prescribed by this part shall pay interest to the treasurer on such property or the value thereof at the rate of fifteen per cent per annum from the date such property should have been reported or delivered or December 22, 1981, whichever is later. The treasurer upon a showing of a good faith effort to comply with this part, may waive the interest prescribed in this section.

Sec. 3-66. Escheat of unclaimed life insurance company funds. Definition. Section 3-66 is repealed.

Sec. 3-66a. Notice by treasurer. (a) On July first each year, or as soon thereafter as practicable, the treasurer shall cause notice to be published of all property having a value of twenty-five dollars or more reported and transferred to him which was presumed abandoned during the preceding calendar year. Such notice shall be published at least once in a newspaper having general circulation in each county in which is located the last-known address of each person appearing to be the owner of such property. If no address is listed, or if the address is not within this state, notice shall be published in a county in which the holder has his principal place of business.

(b) Such notice shall be entitled "Notice of Names of Persons Appearing to Own Abandoned Property" and it shall contain: (1) The names, in alphabetical order, and the last-known addresses, if any, of all persons reported as the apparent owners of unclaimed property and (2) a statement that any person possessing an interest in such property may obtain from the treasurer information concerning the amount and description of such property and the name and address of the holder thereof.

(c) The treasurer may insert in any such notice such additional information as he deems necessary for the proper administration of this part.

(d) The provisions of this section shall not apply to items reported in the aggregate pursuant to subsection (h) of section 3-65a.

Sec. 3-66b. Unclaimed intangible property. Conditions raising presumption of abandonment. Intangible property is subject to the custody of the state as unclaimed property if the conditions raising a presumption of abandonment under section 3-57a, 3-58a, 3-59a, 3-59b, 3-61a or 3-64a are satisfied and:

(1) The last-known address of the apparent owner, as shown on the records of the holder, is in this state;

(2) The records of the holder do not include the name of the person entitled to the property and it is established that the last-known address of such person is in this state;

(3) The records of the holder do not reflect the last-known address of the apparent owner, and it is established that (A) the last-known address of the person entitled to the property is in this state, or (B) the holder is a domiciliary or a governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last-known address of the apparent owner or other person entitled to the property;

(4) The last-known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide by law for the escheat or custodial taking of the property or the escheat or unclaimed property law of which is not applicable to the property and the holder is a domiciliary or a governmental subdivision or agency of this state;

(5) The last-known address of the apparent owner, as shown on the records of the holder, is in a foreign nation and the holder is a domiciliary or a governmental subdivision or agency of this state; or

(6) The transaction out of which the property arose occurred in this state and (A)(i) the last-known address of the apparent owner or other person entitled to the property is unknown, or (ii) the last-known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or the escheat or unclaimed property law of which is not applicable to the property, and (B) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or the escheat or unclaimed property law of which is not applicable to the property.

Sec. 3-67. When funds escheat. Section 3-67 is repealed.

Sec. 3-67a. State responsibility for property. Reimbursement of prior holder for payment to holder. Reimbursement of holder compelled to register transfer of original certificate. (a) Upon payment or delivery of property presumed abandoned to the treasurer, the state shall assume custody and, except as otherwise provided in subsection (h) of section 3-65a, shall be responsible for all claims thereto. If, after payment or delivery to the treasurer, any holder is compelled by authority of another jurisdiction to make a second payment, the treasurer, upon proof thereof, shall refund to the holder the amount of such second payment not in excess of the amount paid or realized under the provisions of this part.

(b) Any holder who, having transmitted unclaimed property to the treasurer, makes payment therefor within the time limited by subsection (a) of section 3-70a to any person appearing to be the owner shall be reimbursed by the treasurer upon proof of payment and upon proof that the payee was entitled thereto.

(c) Whenever any property other than money is paid or delivered to the treasurer under this part, the treasurer upon receipt shall credit to the owner's account any dividends, interest or other increments realized or accruing on the property at or before liquidation or conversion thereof into money.

(d) Any person who pays or delivers to the treasurer, in good faith, property presumed abandoned pursuant to section 3-59b shall be relieved of liability, to the extent of the value of the property so paid or delivered, for any claim then existing or which thereafter may arise or be made in respect to the property. For the purposes of this section "good faith" means that payment or delivery was made in a reasonable attempt to comply with this part, that the person making payment or delivery of the property had a reasonable basis for believing, based on the facts as they were known to him, that the property was abandoned for the purposes of this part; and there is no showing that the records pursuant to which the payment or delivery was made did not meet reasonable standards of practice in the industry.

(e) If such person pays or delivers property to the treasurer, in good faith, property presumed abandoned pursuant to section 3-59b and thereafter any other person claims the property from the person so paying or delivering or another state claims the property under its laws relating to escheat or abandoned or unclaimed property, the treasurer, upon written notice of the claim, shall defend the person who paid or delivered such property against the claim and indemnify him against any liability on the claim.

Sec. 3-68. Report of unclaimed funds. Section 3-68 is repealed.

Sec. 3-68a. Sale of property by treasurer. (a) All unclaimed property, other than money, delivered to the

treasurer under this part shall, at his discretion, be sold by him to the highest bidder at public sale in whatever locality of the state in his judgment affords the most favorable market. The treasurer may decline the highest bid at any such sale and reoffer the property at a later sale if he considers the bid insufficient. He may dispose of any such property by private sale if, in his opinion, the probable cost of public sale will exceed the value of the property. The provisions of this subsection shall not apply to securities for which there is an established market and the treasurer shall sell such securities in the manner customary in that market.

(b) Any ownership interest in a business association for which there is no established market shall be sold at not less than its fair value. The business association shall have the first right to purchase such interest. Such business association may require the treasurer to appoint not more than three independent appraisers to determine the fair value of such interest. The cost of such appraisal shall be borne by the business association requesting the same. The treasurer shall not be obligated to appoint the appraisers unless such business association requesting the appraisal deposits with the treasurer an amount equivalent to the cost of the appraisal as estimated by the treasurer. After transfer to the treasurer in accordance with the provisions of this section and sections 3-59c, 3-59d, 3-67a and 3-73a, the ownership interest so transferred shall remain subject to all limitations on transfer however imposed. Nothing herein shall alter or affect any other provisions limiting the purchase by a business association of its own ownership interests.

(c) Each sale held under this section other than a sale of a security in an established market shall be upon notice published once, at least two weeks in advance of the sale, in a newspaper of general circulation in the town at which the property is to be sold.

(d) Purchasers at such sales shall receive title to the property purchased, free from all claims of owners or prior holders and of all persons claiming through or under them. The treasurer shall execute all documents necessary to complete transfer of title. The treasurer shall proceed with the liquidation of property not earlier than one year after its delivery to him except that property presumed abandoned pursuant to section 3-59b shall not be liquidated earlier than three years after it was delivered unless the treasurer finds that it is in the best interests of the state to do so. If the treasurer sells any securities delivered pursuant to said section 3-59b before the expiration of such three-year period, any person making a claim pursuant to this part before the end of the three-year period is entitled to either the proceeds of the sale of the securities or the market value of the securities at the time the claim is made, whichever amount is greater. A person making a claim under this part after the expiration of such period is entitled to receive either the securities delivered to the treasurer by the holder, if they still remain in the possession of the treasurer, or the proceeds received from sale, but no person has any claim under this part against the state, the holder, any transfer agent, registrar or other person acting for or on behalf of a holder for any appreciation in the value of the property occurring after the delivery by the holder to the treasurer.

Sec. 3-69. Notice. Section 3-69 is repealed.

Sec. 3-69a. Disposition of funds by treasurer. All funds received under this part, including the proceeds from the sale of property, shall be deposited in the general fund; except that the treasurer shall retain in a separate fund twenty-five thousand dollars or an amount equal to seven per cent of the gross receipts of the previous fiscal year, whichever amount is greater, which he may deposit in any bank or trust company in which state funds may be deposited, from which he shall pay all claims allowed as hereinafter provided. If at any time

said fund is insufficient for such purpose, the governor, with the advice and consent of the finance advisory committee, may add thereto from the unappropriated resources of the general fund the amount estimated to be required to make up such deficiency.

Sec. 3-70. Payment to treasurer. Section 3-70 is repealed.

Sec. 3-70a. Claims for abandoned property. (a) Any person claiming an interest in property surrendered to the treasurer under the provisions of this part may claim such property, or the proceeds from the sale thereof, at any time thereafter.

(b) The treasurer shall consider each claim within ninety days after it is filed. He may hold hearings on any claim and he may refer any claim to the claims commissioner, who shall hold hearings thereon and promptly return his recommendations for the payment or rejection thereof. The treasurer shall deliver his decision in writing on each claim heard, with a finding of fact and a statement of the reasons for his decision. No agreement to locate property entered into within two years after the date a report of unclaimed property is filed under section 3-65a shall be valid if, pursuant to such agreement, any person undertakes to locate property included in that report for a fee or other compensation exceeding twenty per cent of the value of the recoverable property. Such an agreement shall be valid only if it is in writing, signed by the owner, and discloses the nature and value of the property, and the owner's share after the fee or compensation has been subtracted is clearly stipulated. Such fee or compensation shall not exceed fifty per cent at any time. Nothing in this section shall be construed to prevent an owner from asserting, at any time, that any agreement to locate property is based upon excessive or unjust consideration.

(c) No claim to property presumed abandoned under sections 3-61a and 3-62a shall be allowed except upon written approval of the attorney general.

(d) The treasurer shall pay each claim allowed without deduction for costs of notices or sale or for service charges. He shall notify the commissioner of revenue services of the payment of claims of five hundred dollars or more to the domiciliary administrator or executor of a deceased owner.

Sec. 3-71. State to assume custody and liability. Section 3-71 is repealed.

Sec. 3-71a. Appeals. Any person aggrieved by a decision of the state treasurer may appeal therefrom in accordance with the provisions of section 4-183, except venue for such appeal shall be in the judicial district of Hartford-New Britain. If an appeal is taken without probable cause, the court may tax double or triple costs against the appellant, as the case demands.

Sec. 3-72. Funds to be paid to general fund and special trust fund. Section 3-72 is repealed.

Sec. 3-72a. Escheat proceedings. (a) Within ninety days after the close of the twentieth calendar year after the year in which any property is presumed abandoned, and no claim therefor having been made and established by any person entitled thereto, the treasurer shall apply to the superior court for the judicial district of Hartford-New Britain for a determination that such property shall escheat to the state.

(b) Such action shall be deemed an action in rem and it shall be commenced in the manner provided by law and by the rules of the superior court for the commencement of civil

actions. The complaint shall state the name and last-known address of each owner of property other than unclaimed funds reported in the aggregate pursuant to subsection (h) of section 3-65a, a description of the property, the name and address of the holder who transferred such property to the treasurer, the amount or value of the property and, if any funds were derived from the sale of property, the date and place of such sale.

(c) At the time such action is commenced, the treasurer shall cause notice thereof to be published once each week for two successive weeks in a newspaper having general circulation in each county in which is located the last-known address of each person listed as an owner in the complaint. Such notice shall be notice to all owners, their heirs, next-of-kin, assigns or other persons in interest to appear and present their claims to the treasurer within ninety days after the last day of publication thereof. Such notice shall be in form substantially as follows:

(Caption)

IN THE MATTER OF THE ESCHEAT OF ABANDONED PROPERTY HELD BY THE TREASURER OF THE STATE OF CONNECTICUT	))))	NOTICE

TO THE FOLLOWING OWNERS, THEIR HEIRS, NEXT-OF-KIN, ASSIGNS OR OTHER PERSONS IN INTEREST OF THE FOLLOWING DESCRIBED PROPERTY:

Name and Address of Owner	Description of Property	Name of Prior Holder	Amount or Value

(Insert complete listing in alphabetical order)

TAKE NOTICE that a complaint has been filed in this cause by the State Treasurer whereby he seeks to escheat the above listed property to the State of Connecticut.

YOU AND EACH OF YOU is advised to present your claim to any of the above-listed property to which you may be entitled within ninety days after the last date of the publication of this notice, said date being . . . ., 19. . .

FAILURE TO PRESENT YOUR CLAIM within the prescribed period will cause said property to escheat to the State of Connecticut as the absolute property of the state and all your right, title or interest thereto will be terminated.

Dated this . . . . day of . . . ., 19. . .

. . . . . .
State Treasurer
State of Connecticut
Room . . . .
State Capitol
Hartford, Connecticut

(d) Promptly upon the completion of such publication, the treasurer shall file a certificate thereof in the superior court.

(e) Any claim presented in response to such notice shall be considered as provided in section 3-71a.

(f) Repealed by P.A. 82-336, S. 2, 3.

Sec. 3-73. Claim. Appeal. Bond. Section 3-73 is repealed.

Sec. 3-73a. Excepted property. (a) The provisions of this part shall not apply to property covered by chapter 66 or section 15-76.

(b) No property shall be presumed abandoned if any person has had uninterrupted adverse use or enjoyment of it under claim of right for a period of fifteen years prior to January 1, 1962.

(c) The provisions of this part shall not apply to any specific property otherwise subject to the provisions of sections 3-57a, 3-59a, 3-59b, 3-60a, 3-61a, 3-62a or 3-65a held for or owing or distributable to or owned by an owner whose last-known address is in another state if such property is subject to escheat under the laws of such other state.

(d) The provisions of this part shall not apply to any property presumed abandoned or escheated under the laws of another state prior to January 1, 1962.

Sec. 3-73b. Effect of expiration of limitation periods. The expiration of any period of time specified by the general statutes or any court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property or affect any duty to file a report required by subsection (b) of section 3-65a or to pay or deliver abandoned property to the state treasurer.

Sec. 3-74. Payment of claim. Section 3-74 is repealed.

Sec. 3-74a. Rules and regulations. (a) The treasurer may make such rules and regulations as he finds necessary to administer and enforce the provisions of this part.

(b) The treasurer may enter into agreements with other states to exchange information needed to enable this state or another state to audit or otherwise determine unclaimed property that it or another state may be entitled to subject

to a claim of custody. The treasurer may require the reporting of information needed to enable compliance with agreements made pursuant to this section and prescribe the form.

(c) The treasurer may enter into agreements with other states providing for the exchange of property in any case in which the provisions of section 3-66b apply.

(d) The treasurer may join with other states to seek enforcement of this part against any person who is or may be holding property reportable under this part.

(e) At the request of another state, the attorney general of this state may bring an action in the name of the treasurer of the other state in any court of competent jurisdiction to enforce the unclaimed property laws of the other state against a holder in this state of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the attorney general in bringing the action.

(f) The treasurer may request that the attorney general of another state or any person in another state bring an action in the name of the treasurer in such other state. This state shall pay all expenses including attorney's fees in any action under this subsection. Payment of such attorney's fees may be based in whole or in part on a percentage of the value of any property recovered in the action. Expenses paid pursuant to this subsection shall not be deducted from the amount that is subject to the claim by the owner under this part.

Secs. 3-75 and 3-76. Record to be kept by treasurer. Application of other statutes. Sections 3-75 and 3-76 are repealed.

MOTION FILED
APR 21 1989

No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
v.
STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
Applicants for Intervention

April 21, 1989

[State Attorneys General Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS GENERAL OF THE APPLICANTS FOR INTERVENTION

Don Siegelman, Attorney General
State of Alabama
State House, 11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

Warren Price, III, Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

Neil F. Hartigan, Attorney General
State of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Linley E. Pearson, Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

Robert T. Stephan, Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—Second Floor
Topeka, Kansas 66612
(913) 296-2215

Frederic J. Cowan, Attorney General
Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

William J. Guste, Jr., Attorney General
State of Louisiana
22nd Floor
State Capitol
Baton Rouge, Louisiana 70804
(504) 342-7013

Marc Racicot, Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

Brian McKay, Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

Robert H. Henry, Attorney General
State of Oklahoma
Room 112, State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Ernest D. Preate, Jr., Attorney General
Commonwealth of Pennsylvania
Strawberry Square—16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

Roger A. Tellinghuisen, Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

R. Paul Van Dam, Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

Kenneth O. Eikenberry, Attorney General
State of Washington
Highways-Licenses Building
7th Floor, MS PB-71
Olympia, Washington 98504
(206) 753-6200

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania ("States"), sovereign states of the United States of America, by and through their Attorneys General and counsel, move this Court for an order permitting them to intervene as Plaintiffs in the above-entitled case and permitting their proposed Complaint in Intervention, attached hereto, to be filed. In support of this motion, and as more fully set forth in the States' Brief in Support of Motion for Leave to File Complaint in Intervention, the States allege as follows:

I.

1. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware, referred to by Delaware as "Escheatable Property of Unknowns."

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. Texas, like Delaware, raised the issue as to which state is entitled to claim and take possession of "Escheatable Property of Unknowns," which it referred to as "Excess Receipts." The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by clearinghouses for the settlement of trades in securities, and unclaimed principal and interest payments on state and municipal obligations.

4. As set forth in the attached proposed Complaint in Intervention, the States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Receipts," as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Excess Receipts are Distributions received by these brokerage firms for the

benefit of the entities or individuals who possess the economic rights to the securities, including the entitlement to Distributions ("Beneficial Owners"), but which do not reach the Beneficial Owners. Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time they generally are demanded by and are remitted to New York.

(b) "Additional Excess Receipts" consist of (i) Distributions presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities; and (ii) Distributions consisting of unclaimed principal and interest payments on state and municipal obligations. Additional Excess Receipts come into being in the same manner as Excess Receipts.

(c) The foregoing definitions of the intangible property which is the subject of this lawsuit are substantively the same as those used by Texas with one exception: they include the same classes of unclaimed property held by non-Delaware brokerage firms and by nonbrokerage firm intermediaries in addition to clearinghouses.

5. The Excess Receipts and Additional Excess Receipts (collectively "Funds") claimed herein constitute unclaimed property which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities ("Issuer") do not reach the Beneficial Owner. Intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, act on behalf of the Issuer and the Beneficial Owner with respect to Distributions.

6. If the identity of the Beneficial Owner is unknown, Distributions by corporations ("Corporate Issuers") and state and local governmental entities ("Government Is-

suers") that are unclaimed should be remitted to the state in which the Corporate Issuer is incorporated, or to the state of the Government Issuer, pursuant to each such state's unclaimed property statute. Each State claims such Distributions by Corporate Issuers incorporated within that State and by Government Issuers of that State.

7. The amount of the Funds at issue in this litigation that the States are entitled to is presently unknown, but is substantial.

8. Upon information and belief, portions of the Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners.

9. The decision of the Court in this action will conclusively determine the right of the States to claim and take possession of the Funds. If the contention of either Delaware or New York is sustained, the States will be precluded from claiming and taking possession of the Funds.

10. The States' interests are not adequately represented by the original parties because Delaware, New York and the States each assert conflicting claims to the Funds. The States' interests are not adequately represented by Texas because Texas has not put in issue all the intangible personal property sought by the States. Texas, moreover, cannot be expected to identify, advocate and protect the rights of the States for several reasons: (i) Texas has no incentive to identify the property held by New York which properly belongs to the States; (ii) each State's claims are based on its own unclaimed property statute, which Texas cannot be expected to master so as to adequately represent the interests of the States; and (iii) although Texas and the States dispute the right of Delaware and New York to the Funds, Texas and the

States may assert conflicting claims thereto as the record becomes fully developed.

11. The States' motion is timely because neither Delaware nor New York has responded to Texas' Complaint in Intervention and the only discovery that has occurred has been a single set of interrogatories which Delaware has served on New York and New York has answered.

12. For the foregoing reasons, the States are entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure.

II.

13. Alternatively, the States request this Court to exercise its discretion and allow intervention pursuant to Rule 24(b)(2), Federal Rules of Civil Procedure.

14. A determination of the States' claims to the Funds involves questions of law and fact common to those already before the Court.

15. The States' intervention will aid in the resolution of the factual issues presented and the application of the law to the facts.

16. The States' intervention will not unduly delay or prejudice the adjudication of the rights of the parties to this action.

17. The States' intervention will avoid a multiplicity of lawsuits by obviating the need for the States to file separate actions against New York, thus expediting the ultimate resolution of the entire controversy and promoting judicial economy and efficiency.

18. For the foregoing reasons, the States should be allowed permissive intervention pursuant to Rule 24(b)(2), Federal Rules of Civil Procedure.

III.

19. In *Western Union Telegraph Company* v. *Pennsylvania*, 368 U.S. 71, 79 (1961), this Court recognized the difficulties inherent in resolving controversies between

different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that this Court is the appropriate forum in which "all the States that want to do so can present their claims for consideration and final, authoritative determination." *See also Pennsylvania* v. *New York*, 407 U.S. 206 (1972); *Texas* v. *New Jersey*, 379 U.S. 674 (1965).

20. The States seek the opportunity to present their claims to this Court. This Court has allowed Texas to intervene in this action, and for purposes of this motion the States stand in the same position as did Texas prior to the granting of its motion.

21. Wherefore, the States pray that their Motion for Leave to File Complaint in Intervention be granted.

Respectfully submitted,

Of Counsel:

DON SIEGELMAN
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WARREN PRICE, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

NEIL F. HARTIGAN
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3000

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
Applicants for Intervention

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—
Second Floor
Topeka, Kansas 66612
(913) 296-2215

FREDERIC J. COWAN
Attorney General
Commonwealth of
Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, Louisiana
70804
(504) 342-7013

MARC RACICOT
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

BRIAN MCKAY
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

ROBERT H. HENRY
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General
Commonwealth of
Pennsylvania
Strawberry Square—
16th Floor
Harrisburg, Pennsylvania
17120
(717) 787-3391

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

R. PAUL VAN DAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General
State of Washington
Highways-Licenses
Building
7th Floor, MS PB-71
Olympia, Washington 98501
(206) 753-6200

April 21, 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF ALABAMA,
HAWAII, ILLINOIS, INDIANA,
KANSAS, LOUISIANA, MONTANA,
NEVADA, OKLAHOMA, SOUTH DAKOTA,
UTAH AND WASHINGTON, AND COMMONWEALTHS OF
KENTUCKY AND PENNSYLVANIA,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

The States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South

Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania, Plaintiffs in Intervention, by and through their Attorneys General and counsel, file this Complaint in Intervention and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and nonbrokerage firm intermediaries.

III. INTEREST AND CLAIM OF PLAINTIFFS IN INTERVENTION

4. Plaintiffs in Intervention are the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania ("States").

5. The States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Re-

ceipts," as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Excess Receipts are Distributions received by these brokerage firms for the benefit of the entities or individuals who possess the economic rights to the securities, including the entitlement to Distributions ("Beneficial Owners"), but which do not reach the Beneficial Owners. Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time they generally are demanded by and are remitted to New York.

(b) "Additional Excess Receipts" consist of (i) Distributions presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities; and (ii) Distributions consisting of unclaimed principal and interest payments on state and municipal obligations. Additional Excess Receipts come into being in the same manner as Excess Receipts.

6. The Excess Receipts and Additional Excess Receipts (collectively "Funds") claimed herein constitute ununclaimed property which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities ("Issuer") do not reach the Beneficial Owner. Intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, act on behalf of the Issuer and the Beneficial Owner with respect to Distributions.

7. If the identity of the Beneficial Owner is unknown, Distributions by corporations ("Corporate Issuers") and state and local governmental entities ("Government Issuers") that are unclaimed should be remitted to the state in which the Corporate Issuer is incorporated, or to the state of the Government Issuer, pursuant to each such state's unclaimed property statute. Each State claims such Distributions by Corporate Issuers incorporated within that State and by Government Issuers of that State.

8. Upon information and belief, portions of the Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners.

PRAYER FOR RELIEF

WHEREFORE, the States pray:

1. That New York be restrained and enjoined from expending any Funds collected but presently unspent, and any Funds it may collect in the future, until such time as this controversy is resolved, and that all such Funds be kept in a segregated account;

2. That judgment be entered declaring that if the Beneficial Owners are unknown, the Funds held by brokerage firms and other intermediaries attributable to Corporate Issuers and Government Issuers are subject only to the claims of the state of incorporation of the Corporate Issuer or the state of the Government Issuer;

3. That New York be directed to pay or deliver to each of the States all Funds it has received and may receive, where the Beneficial Owners of the Funds are unknown, that are attributable to Corporate Issuers incorporated in each such State and to Government Issuers of each such State, which presently are deemed abandoned

pursuant to the applicable dormancy period under each such State's unclaimed property statute;

4. That New York be directed to pay or deliver to each of the States all remaining Funds it has received and may receive, where the Beneficial Owners of the Funds are unknown, that are attributable to Corporate Issuers incorporated in each such State and to Government Issuers of each such State, as such Funds become abandoned pursuant to the applicable dormancy period under each such State's unclaimed property statute; and

5. Such other and further relief as this Court deems just and proper.

Of Counsel:

DON SIEGELMAN
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WARREN PRICE, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

NEIL F. HARTIGAN
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3000

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
Plaintiffs in Intervention

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—
Second Floor
Topeka, Kansas 66612
(913) 296-2215

FREDERIC J. COWAN
Attorney General
Commonwealth of
Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, Louisiana
70804
(504) 342-7013

MARC RACICOT
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

BRIAN MCKAY
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

ROBERT H. HENRY
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General
Commonwealth of
Pennsylvania
Strawberry Square—
16th Floor
Harrisburg, Pennsylvania
17120
(717) 787-3391

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

R. PAUL VAN DAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General
State of Washington
Highways-Licenses
Building
7th Floor, MS PB-71
Olympia, Washington 98504
(206) 753-6200

April 21, 1989

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
ARGUMENT	5
I. The States Satisfy The Requirements For Intervention Set Forth In Fed. R. Civ. P. 24(a)(2), And Are Therefore Entitled To Intervene As A Matter Of Right	5
A. The standards of Rule 24(a)(2) are met	6
B. The States' motion is timely	7
II. Permissive Intervention Pursuant To Fed. R. Civ. P. 24(b)(2) Is Appropriate	8
III. Intervention Is Proper Under The Principles Established By This Court	10
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Consolidated Edison Co. v. Breznay, —— F.2d —— (Temp.Em.Ct.App. No. DC-108 March 14, 1989) 7
NAACP v. New York, 413 U.S. 345 (1973) 7, 8
New York Petroleum Corp. v. Ashland Oil, Inc., 757 F.2d 288 (Temp.Em.Ct.App. 1985) 7
Pennsylvania v. New York, 407 U.S. 206 (1972) ..... *passim*
Texas v. New Jersey, 379 U.S. 674 (1965) ..... *passim*
Texas v. New Jersey, No. 13 Original, Report of Special Master on Application of Florida for Permission to Intervene (May 10, 1963) 8
Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961) 10

RULES

Fed. R. Civ. P. 24(a)(2) 5, 6
Fed. R. Civ. P. 24(b)(2) 8, 9, 10
U.S. Supreme Court Rule 9.2 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware, referred to by Delaware as "Escheatable Property of Unknowns." On December

12, 1988, Thomas Jackson, Esquire, was appointed Special Master. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. Texas, like Delaware, raised the issue as to which state is entitled to claim and take possession of "Escheatable Property of Unknowns," which it referred to as "Excess Receipts." The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by clearinghouses for the settlement of trades in securities, and unclaimed principal and interest payments on state and municipal obligations.

Applicants for Intervention, the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania ("States"), seek leave to intervene in order to assert their claim to a portion of the unclaimed property in controversy and certain additional property which comes into being in the same manner.

STATEMENT OF THE CASE

The States' proposed Complaint in Intervention ("Complaint") sets forth the entitlement of the States to certain unclaimed intangible personal property, referred to by the States as "Excess Receipts" and "Additional Excess Receipts" (collectively "Funds"), which comes into being and acquires its character as unclaimed property in the context of securities transactions.

Excess Receipts as defined in the Complaint and motion consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Excess Receipts are Distributions received by these brokerage firms for the benefit of the entities or individuals who possess the economic rights to the secu-

rities, including the entitlement to Distributions ("Beneficial Owners"), but which do not reach the Beneficial Owners. Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time they generally are demanded by and are remitted to New York.

Additional Excess Receipts as defined in the Complaint and motion consist of (i) Distributions presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities; and (ii) Distributions consisting of unclaimed principal and interest payments on state and municipal obligations. Additional Excess Receipts come into being in the same manner as Excess Receipts.

These definitions of the intangible property which is the subject of this lawsuit are substantively the same as those used by Texas with one exception: they include the same classes of unclaimed property held by non-Delaware brokerage firms and by nonbrokerage firm intermediaries in addition to clearinghouses.

The Funds claimed by the States constitute unclaimed property which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities ("Issuer") do not reach the Beneficial Owner. Intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, act on behalf of the Issuer and the Beneficial Owner with respect to Distributions.

Delaware, New York and the States assert conflicting claims to the Excess Receipts based on the decisions of this Court in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972). Delaware contends that Excess Receipts held by brokerage firms incorporated in Delaware should be re-

mitted to it as the state of incorporation of the brokerage firms holding such funds, since the identities of the Beneficial Owners of the Excess Receipts are unknown. New York contends that it should receive those Excess Receipts because they are owed to other brokerage firms, and most brokerage firms have New York trading addresses.

Texas contends that it should receive that portion of the unclaimed property in controversy resulting from Distributions by corporate and governmental issuers of that state. As Texas made clear in its intervention papers, Delaware's Complaint did not include significant aspects of the securities distribution system. For example, Delaware did not address entitlement to unclaimed intangible personal property held by intermediaries not incorporated in Delaware, because under Delaware's legal theory, it would have no right to claim and take possession of such intangible personal property. Texas' Complaint properly expanded the action to encompass unclaimed intangible personal property held by clearinghouses. It did not, however, include brokerage firms not incorporated in Delaware or nonbrokerage firm intermediaries other than clearinghouses.

The States make the same claim as Texas, adding thereto certain additional property. The States' Complaint encompasses all intermediaries, wherever incorporated, because an intermediary's state of incorporation is merely incidental to the factual and legal analysis required to decide the issues underlying this lawsuit. New York's wrongful takings have not been limited to Delaware brokerage firms and clearinghouses. The entire securities distribution system must be examined for the proper resolution of the issues presently before the Court, and for this analysis it matters not whether a brokerage firm or intermediary is incorporated in Delaware or in another state. Moreover, it would be inefficient to leave "loose ends," such as non-Delaware brokerage firms and nonbrokerage firm intermediaries other than clearinghouses,

which otherwise would have to be addressed in a separate lawsuit.

The States assert their claims pursuant to their respective unclaimed property statutes, which provide, *inter alia*, for the custodial taking of unclaimed intangible personal property when the identity of the owner of the property is unknown to the holder but Distributions were made by corporations incorporated in one of the States, by one of the States, or by local governmental entities of one of the States, and no claim by the owner of said property has been asserted within the applicable dormancy period. The States' respective unclaimed property statutes provide that after the expiration of the applicable dormancy period, the property is presumed abandoned and shall be remitted to the State. A copy of the relevant portions of each of the States' unclaimed property statutes is set forth in the Appendix hereto.

Application of the rule of law set forth in *Texas* v. *New Jersey* and *Pennsylvania* v. *New York* requires that judgment be entered for the States. No new rule of law need be established to achieve that result.

ARGUMENT

I. The States Satisfy The Requirements For Intervention Set Forth In Fed. R. Civ. P. 24(a)(2), And Are Therefore Entitled To Intervene As A Matter Of Right

Rule 9.2 of the Supreme Court directs that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions." Fed. R. Civ. P. 24(a)(2), which is the appropriate guide for determining the propriety of intervention by a nonparty in an original jurisdiction action, provides that any person who timely applies shall be permitted to intervene in an action:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of

the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A. *The standards of Rule 24(a)(2) are met*

The States claim a portion of the specific unclaimed property, *i.e.*, the Funds, which constitutes the subject matter of this action. The total amount of the Funds presently claimed by the States, while presently unknown, is substantial and sufficient to establish the entitlement of the States to intervene as a matter of right.

This Court has previously allowed states to intervene in original jurisdiction unclaimed property suits when the intervenor states were claiming an interest in the property that was the subject of the controversy. *See, e.g., Texas* v. *New Jersey, supra,* and *Pennsylvania* v. *New York, supra.* The State of Florida was permitted to intervene in *Texas* v. *New Jersey,* based upon its claim that it had the right to escheat or take possession of a portion of the property involved in that case, just as Texas has been allowed to intervene in this lawsuit. As to intervention, the position of the States here is indistinguishable from that of Florida and Texas.

The right of the States to claim and take possession of the Funds will be conclusively determined by the Court's decision in this proceeding. If the contention of either Delaware or New York is sustained, the States will be precluded from claiming and taking possession of the Funds.

The States' interests are not adequately represented by the original parties because Delaware, New York and the States each assert conflicting claims to the Funds. The States' interests are not adequately represented by Texas because Texas has not put in issue all the intangible personal property sought by the States. Texas, moreover,

cannot be expected to identify, advocate and protect the rights of the States for several reasons: (1) Texas has no incentive to identify the property held by New York which properly belongs to the States. (2) Each State's claims are based on its own unclaimed property statute, which Texas cannot be expected to master so as to adequately represent the interests of the States. (3) Although Texas and the States dispute the right of Delaware and New York to the Funds, Texas and the States may assert conflicting claims thereto as the record becomes fully developed.

The States should not be required to depend upon another state to protect their interests. This is especially so in a situation such as this where the States would have no recourse if that state failed adequately to do so. "When a party decides to forego taking action in a lawsuit in the expectation that another party will protect its interests, it does so at its peril." *Consolidated Edison Co.* v. *Breznay*, No. DC-108, slip op. at 15 (Temp. Em. Ct. App. March 14, 1989) (quoting *New York Petroleum Corp.* v. *Ashland Oil, Inc.*, 757 F.2d 288, 292 (Temp. Em. Ct. App. 1985)).

Clearly, the interests of the States are not and cannot be adequately represented by the existing parties. Under these circumstances, the States have satisfied the standards for intervention as a matter of right.

B. *The States' motion is timely*

The States' Motion for Leave to File Complaint in Intervention is timely. "Timeliness is to be determined from all the circumstances." *NAACP* v. *New York*, 413 U.S. 345, 366 (1973). The point to which the suit has progressed is a factor for the Court to consider, although other factors may be considered as well. *Id.* at 365-66.

This Court has allowed States to intervene in original jurisdiction unclaimed property cases after the Answer

to the initial Complaint was filed. *See, e.g., Texas* v. *New Jersey, supra,* and *Pennsylvania* v. *New York, supra.* For example, in *Texas* v. *New Jersey,* the State of Florida was permitted to intervene more than six months after the State of New Jersey filed its Answer. *See Texas* v. *New Jersey,* No. 13 Original, Report of Special Master on Application of Florida for Permission to Intervene at 5 (May 10, 1963). Although intervention was denied in *NAACP, supra,* a decision on summary judgment was imminent.

Unlike *NAACP,* the instant case has barely commenced; indeed, it has not progressed beyond the initial pleadings stage. Texas was permitted to intervene on February 21, 1989. The Answer to Texas' Complaint has not been filed. The Master has not yet scheduled the first status conference. Although significant factual development may be required, only one set of interrogatories has been served; and the only substantive activity in the suit since Texas' Motion for Leave to File Complaint in Intervention was granted has been the filing of responses to that one set of interrogatories. Thus, intervention by the States will neither prejudice any of the parties, nor interrupt or delay the litigation. The States' Motion for Leave to File Complaint in Intervention, accordingly, is timely.

II. Permissive Intervention Pursuant To Fed. R. Civ. P. 24(b)(2) Is Appropriate

Alternatively, the States urge the Court to exercise its discretion to allow permissive intervention in favor of the States pursuant to Rule 24(b)(2). The considerations which support intervention as a matter of right also justify permissive intervention by the States.

Rule 24(b) reads in pertinent part as follows:

> Upon timely application anyone may be permitted to intervene in an action: * * * (2) when an applicant's claim or defense and the main action have a question of law or fact in common. * * * In exer-

> cising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

The States' claims involve questions of law and fact common to those present in the litigation. The principal authorities relied upon by the States, Texas, Delaware and New York in support of their claims are identical. The Court must analyze the whole securities distribution system in order to apply the rule of *Texas* v. *New Jersey*, *supra*, and *Pennsylvania* v. *New York*, *supra*.

If the States are not permitted to intervene and assert their claims, the likelihood is great that development and analysis of the facts and the law will be incomplete. The States' intervention in this action will aid in the resolution of the factual issues and the application of the law to the facts. Moreover, once the record in the case is fully developed, application of the controlling precedents may result in divergent interests, beyond those that presently exist, between Delaware, New York, Texas and the States. Consequently, the States urge the Court not to deny these issues the benefit of the advocacy of all parties with a direct interest in and claim to the property.

The States' intervention will also avoid a multiplicity of lawsuits by obviating the need for the States to file separate actions against New York. Thus, intervention by the States will expedite the ultimate resolution of the entire controversy, and will promote judicial economy and efficiency.

Pursuant to Rule 24(b)(2), the Court may exercise its discretion and allow permissive intervention if an applicant's claim involves issues of fact or law common to those already present in the litigation and intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties. As previously stated,

this litigation is at an early stage. The States respectfully submit that the criteria set forth in Rule 24(b)(2) have been satisfied, and that they should be allowed to intervene.

III. Intervention Is Proper Under The Principles Established By This Court

In *Western Union Telegraph Company* v. *Pennsylvania*, 368 U.S. 71, 79 (1961), this Court recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that this Court is the appropriate forum in which "all the States that want to do so can present their claims for consideration and final, authoritative determination." *See also Pennsylvania* v. *New York*, *supra* (Arizona, California, Connecticut and Indiana permitted to intervene); *Texas* v. *New Jersey*, *supra* (Florida permitted to intervene).

The States seek the opportunity to present their claims to this Court. This Court has allowed Texas to intervene in this action, and for purposes of this motion the States stand in the same position as did Texas prior to the granting of its motion. Therefore, intervention in this suit by the States not only is appropriate, but is necessary for the equitable resolution of this controversy.

CONCLUSION

For the reasons stated, the Motion of the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

Of Counsel:

DON SIEGELMAN
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WARREN PRICE, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

NEIL F. HARTIGAN
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3000

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—
Second Floor
Topeka, Kansas 66612
(913) 296-2215

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
Applicants for Intervention

FREDERIC J. COWAN
Attorney General
Commonwealth of
Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, Louisiana
70804
(504) 342-7013

MARC RACICOT
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

BRIAN MCKAY
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

ROBERT H. HENRY
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General
Commonwealth of
Pennsylvania
Strawberry Square—
16th Floor
Harrisburg, Pennsylvania
17120
(717) 787-3391

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

R. PAUL VAN DAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General
State of Washington
Highways-Licenses
Building
7th Floor, MS PB-71
Olympia, Washington 98504
(206) 753-2200

April 21, 1989

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATE OF TEXAS,

Intervenor Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ANSWER OF PLAINTIFF, THE STATE OF DELAWARE, TO THE COMPLAINT IN INTERVENTION OF THE STATE OF TEXAS

Charles M. Oberly, III
Attorney General of Delaware
Fred S. Silverman
Chief Deputy Attorney General
J. Patrick Hurley, Jr.
Assistant Attorney General
Richard L. Sutton, Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

April 24, 1989

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

No. 111 Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATE OF TEXAS,

Intervenor Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

ANSWER OF PLAINTIFF, THE STATE OF DELAWARE, TO THE COMPLAINT IN INTERVENTION OF THE STATE OF TEXAS

Plaintiff, The State of Delaware ("Delaware"), answers the Complaint in Intervention of The State of Texas ("Texas"), as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Delaware is without knowledge or information suffi-

cient at present to form a belief as to the truth of the averments of paragraph 4.

5. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 5, except admitted that, as originally filed by Delaware, this action sought to resolve the conflicting claims of The State of New York ("New York") and Delaware with respect to the Escheatable Property of Unknowns, as defined in paragraphs 8 and 9 of Delaware's Complaint (hereinafter "Escheatable Property of Unknowns"), and that New York's current practice is to claim Escheatable Property of Unknowns after the applicable dormancy period.

6. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 6.

7. Denied.

8. Denied.

9. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 9.

10. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 10, except that denied, if it is alleged that Chapter 72 of the Texas Property Code provides for any taking of the Escheatable Property of Unknowns.

11. through 19. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraphs 11 through 19. Further, Delaware alleges that such averments insofar as they are directed to Delaware are unnecessary and immaterial.

20. Delaware admits and alleges that Delaware's claim is supported by the rulings of this Court in *Texas v. New Jersey* and *Pennsylvania v. New York*, and respectfully refers the Court to the opinions in such cases for a full statement of the rulings. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments as to New York.

21. Delaware incorporates by reference herein its Com-

plaint in this action and respectfully refers the Court thereto for a complete statement of Delaware's claim, and admits and alleges that Escheatable Property of Unknowns should be remitted to Delaware as the state of incorporation of the Delaware Brokerage Corporations which hold, or have held, such funds.

22. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 22, except denied that New York is entitled to claim any portion of the Escheatable Property of Unknowns.

23. Denied, except Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments as to New York.

24. Denied, except that the averments of the first two sentences of paragraph 24 are admitted.

25. through 38. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraphs 25 through 38, except admitted that there are no records of ownership as to the Escheatable Property of Unknowns, and that it is neither cost effective nor feasible to maintain or reconstruct such records. Further, Delaware alleges that the averments of paragraphs 25 through 38 insofar as they are directed to Delaware are unnecessary and immaterial.

39. Denied, except admitted that neither DTC nor any Delaware Brokerage Corporation has claimed any legal ownership interest to the Escheatable Property of Unknowns.

40. Denied.

41. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 41, except admitted that Delaware has identified in its complaint fifteen Delaware Brokerage Corporations, including Dean Witter Reynolds, Inc., from which New York has either wrongfully taken or demanded the Escheatable Property of Unknowns at issue herein, that Texas claims the right to take possession of any portion of such Escheatable Property of Unknowns which is attributable to

Issuers incorporated in Texas, and denied, if it is alleged that Texas is entitled to any portion of the Escheatable Property of Unknowns.

42. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 42, except denied, if it is alleged that Texas is entitled to any portion of the Escheatable Property of Unknowns.

43. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 43, except denied, if it is alleged that Texas is entitled to any portion of the Additional Excess Receipts.

44. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 44.

45. through 50. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraphs 45 through 50. Further, Delaware alleges that such averments insofar as they are directed to Delaware are unnecessary and immaterial.

51. and 52. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraphs 51 and 52.

53. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 53, except denied, if it is alleged that Texas is entitled to any portion of the Escheatable Property of Unknowns.

54. Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 54.

55. Denied, except Delaware admits the averments of the second sentence of paragraph 55 and alleges that the averments of paragraph 55 insofar as they are directed to Delaware are redundant or immaterial.

56. Denied, except Delaware admits the averments of the second sentence of paragraph 56 and that in accordance with

Delaware's claim all Escheatable Property of Unknowns held by DTC Participants would go to Delaware, and except that Delaware is without knowledge or information sufficient at present to form a belief as to the truth of the averments of paragraph 56 as to New York. Further, Delaware alleges that the averments of paragraph 56 insofar as they are directed to Delaware are redundant or immaterial.

57. Delaware admits the averments of the first sentence of paragraph 57, denies the averments of the following two sentences of paragraph 57, and is without knowledge or information sufficient at present to form a belief as to the truth of the remaining averments in paragraph 57.

58. Denied.

59. Denied, except Delaware admits the averments of the second sentence of paragraph 59, and is without knowledge or information sufficient at present to form a belief as to the truth of the averments as to New York.

Defenses

1. Texas' claim in intervention should be dismissed for failure to state a claim under the prior controlling decisions of this Court.

2. Texas is estopped from asserting its claim in intervention by reason of its prior positions before this Court.

Charles M. Oberly, III
Attorney General of Delaware

Fred S. Silverman
Chief Deputy Attorney General

J. Patrick Hurley, Jr.
Assistant Attorney General

Richard L. Sutton,
Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

April 24, 1989

PROOF OF SERVICE

I, RICHARD L. SUTTON, certify that I am counsel of record for plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 24th day of April, 1989, I served copies of the foregoing Answer Of Plaintiff, The State Of Delaware, To The Complaint In Intervention Of The State Of Texas, on all parties required to be served by depositing such copies, first-class postage prepaid, in a United States Post Office, addressed as follows:

Mary F. Keller, Esquire
First Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, Texas 78711

Christopher Keith Hall, Esquire
Assistant Attorney General
Attorney General's Office
120 Broadway
New York, New York 10271

Richard L. Sutton
Counsel of Record for Plaintiff,
the State of Delaware
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899
(302) 658-9200

Supreme Court, U.S.
FILED
APR 24 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NEW MEXICO FOR LEAVE TO INTERVENE

HONORABLE HAL STRATTON
Attorney General of New Mexico

RANDALL W. CHILDRESS
Deputy Attorney General

CHARLES R. PEIFER
Chief Assistant Attorney General

GEORGE W. K. SNYDER, JR.*
Assistant Attorney General and Director, Governmental Liaison Division

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF AUTHORITIES

Page

CASES:

Pennsylvania v. New York, 407 U.S. 206 (1972) 6

Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961) 5

MISCELLANEOUS:

Rule 9 of the Rules of the Supreme Court 1

Rule 24(a) (2), Federal Rules of Civil Procedure 5

Rule 24(b), Federal Rules of Civil Procedure 5

New Mexico Statutes Annotated Chapter 7, Article 8, the "Uniform Disposition of Unclaimed Property Act" 4

"An Act, Relating to Unclaimed Property," N.M. Laws 1989, ch. 293 4

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NEW MEXICO FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of New Mexico, by its Attorney General, Hal Stratton, moves the Court for an order permitting it to intervene as a plaintiff in this cause and permitting it to adopt, to the extent appropriate, the Complaint in Intervention and Brief in Support of Motion for Leave to File heretofore filed by the State of Texas, Plaintiff in Intervention. In support of this motion, New Mexico states as follows:

1. On or about May 31, 1988, the Court granted the motion of Plaintiff State of Delaware for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("*Excess Receipts*"),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the motion of Plaintiff in Intervention State of Texas to intervene and file its Complaint in Intervention in this case.

4. As set forth in detail in its Complaint, Texas claims a portion of the *Excess Receipts* that constitute the subject matter of the original controversy between Delaware and New York. Specifically, the portion of *Excess Receipts* held or formerly held by securities brokerage houses incorporated in Delaware that are attributable to *Issuers* incorporated in Texas is claimed.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to *Issuers* incorporated in Texas held or formerly held by the *Depository Trust Com-*

---

[1] In its Complaint in Intervention, Texas has defined certain terms. New Mexico incorporates those definitions herein by reference and has italicized the defined terms herein.

pany and excess receipts that have arisen in connection with *Distributions* made by Texas municipal and other *Governmental Issuers* ("*Additional Excess Receipts*") that are now being demanded by or remitted to New York. It is the understanding of New Mexico that the Court intends to consider claims to both the *Excess Receipts* originally at issue, and the *Additional Excess Receipts* identified by Texas.

6. Texas claims a portion of the *Excess Receipts* and the *Additional Excess Receipts* for the reason that they constitute a debt owed by the *Issuer* to the securities' *Beneficial Owner*. If the identity of the *Beneficial Owner* is unknown, the *Excess Receipts* and *Additional Excess Receipts* should be remitted to the state of incorporation of the *Issuer* under that state's unclaimed property law.

7. New Mexico claims a portion of the *Excess Receipts* and *Additional Excess Receipts* at issue in this action. Specifically, the portions of the *Excess Receipts* and *Additional Excess Receipts* attributable to *Issuers* incorporated in the State of New Mexico and to New Mexico municipalities and other governmental entities are claimed.

8. The amount of *Excess Receipts* and *Additional Excess Receipts* that New Mexico is entitled to claim is presently unknown. New Mexico has never, prior to this lawsuit, had any reason to identify and quantify such *Excess Receipts* and *Additional Excess Receipts*. However, it is probable that at least one *Issuer* incorporated in New Mexico has generated *Excess Receipts* and *Additional Excess Receipts*. Moreover, it is a virtual certainty that bonds issued by New Mexico municipalities and other

governmental entities have generated *Additional Excess Receipts* subject to the claim of New Mexico.

9. New Mexico asserts its claim pursuant to New Mexico Statutes Annotated Chapter 7, Article 8, the "Uniform Disposition of Unclaimed Property Act." The New Mexico law provides, in essence, for the custodial taking of abandoned or unclaimed tangible or intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to the property has been asserted within the applicable dormancy period, which for most types of personal property is seven[2] years.

10. New Mexico supports, and adopts as if fully set forth in pleadings of its own, Texas' Complaint in Intervention and Brief in Support of Motion for Leave to File, and the factual allegations and legal arguments set forth therein, to the extent they are applicable to the claims of New Mexico set forth in Paragraph 7 above.

11. Although New Mexico adopts the Complaint in Intervention filed by Texas, it is essential that it be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law that will conclusively determine the future right of New Mexico to claim and take possession of unclaimed property similar or identical to the *Excess Receipts* and *Additional*

---

[2] On April 6, 1989, the Governor of New Mexico signed into law House Bill 693, "An Act Relating to Unclaimed Property," N.M. Laws 1989, ch. 293. The Act, which rewrote the existing law, goes into effect on June 16, 1989. One of the more significant changes, for present purposes, is the reduction of the applicable dormancy period for most types of personal property from seven to five years.

Excess Receipts at issue herein. Additionally, if New Mexico is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those *Excess Receipts* and *Additional Excess Receipts* attributable to *Issuers* incorporated in New Mexico. As a party, New Mexico can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to it.

12. Based on the foregoing, New Mexico is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, New Mexico urges the court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of New Mexico in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including New Mexico, wishing to intervene and represent themselves in this case. The addition of New Mexico as a Plaintiff in Intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. The Court, in *Western Union Telegraph Company v. Pennsylvania,* 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the

appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. *See also, Pennsylvania v. New York,* 407 U.S. 206 (1972). It is such an opportunity to present its claim that New Mexico seeks by urging this Court to grant leave to intervene herein.

WHEREFORE, New Mexico prays that it be permitted to intervene as a plaintiff in this case and to adopt, as if fully set forth in pleadings of its own, Texas' Complaint in Intervention and Brief in Support of the Motion for Leave to File, and the factual allegations and legal arguments set forth therein, to the extent same are applicable to the claims of New Mexico. Alternatively, New Mexico prays that it be permitted to file its own Complaint in Intervention setting forth the factual and legal arguments asserted by Texas in its Complaint and seeking, on behalf of New Mexico, relief of the same nature as that sought by Texas.

Dated: April 24, 1989.

Respectfully submitted,

HONORABLE HAL STRATTON
Attorney General of New Mexico

RANDALL W. CHILDRESS
Deputy Attorney General

CHARLES R. PEIFER
Chief Assistant Attorney General

GEORGE W. K. SNYDER, JR.*
Assistant Attorney General and Director, Governmental Liaison Division

*Counsel of Record

MOTION FILED
APR 25 1989

No. 111 Original

In The
Supreme Court of the United States
October Term, 1988

STATE OF DELAWARE,
Plaintiff,

and

STATE OF TEXAS,
Plaintiff in Intervention,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATE OF TENNESSEE FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

MICHAEL W. CATALANO
Deputy Attorney General
State of Tennessee

[Counsel of Record]

450 James Robertson Parkway
Nashville, Tennessee 37219-5025

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF AUTHORITIES

Page

CASES:

Pennsylvania v. New York, 407 U.S. 206 (1972) 6

Texas v. New Jersey, 379 U.S. 674 (1965) 9

Western Union Telegraph Company v. Pennsylvania, 369 U.S. 71 (1961) 6

STATUTES:

Article III, Section 2 of the Constitution of the United States 7

Section 1251 of Title 28 of the United States Code 8

No. 111 Original

In The
Supreme Court of the United States
October Term, 1988

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF TENNESSEE FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Tennessee, a sovereign state of the United States of America, by and through Charles W. Burson, Attorney General and Reporter for the State of Tennessee, moves this Court for an order permitting intervention in the above-styled case, and permitting the adoption, to the extent appropriate, of the brief in support of motion

for leave to file a complaint filed by the State of Texas, the plaintiff in intervention. In support of this motion, the State of Tennessee states the following:

1. On or about May 31, 1988, this Court granted the motion of plaintiff, State of Delaware (Delaware), for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant, State of New York (New York), as to which the state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property (excess receipts),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson was appointed Special Master in this case.

3. On February 21, 1989, this Court granted the motion of Texas to intervene and file its complaint in intervention in this case.

4. As set forth in detail in its complaint, Texas claims a portion of the excess receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that a portion of the excess receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to issuers incorporated in Texas.

---

[1] In its complaint in intervention, the plaintiff in intervention, Texas (Texas), has defined certain terms relative to this case. The State of Tennessee incorporates those definitions into this motion by reference.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company (DTC) and excess receipts which have arisen in connection with distribution made by Texas municipal and other governmental issuers (additional excess receipts) which are now being demanded by or remitted to New York. It is the understanding of the State of Tennessee that this Court intends to consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims a portion of the excess receipts and the additional excess receipts for the reason that they constitute a debt owed by the issuer to the securities' beneficial owner. If the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under the state's unclaimed property law.

7. The State of Tennessee claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional excess receipts attributable to the issuers incorporated in the State of Tennessee and that portion attributable to Tennessee municipalities and other governmental entities.

8. The amount of excess receipts and additional excess receipts that the State of Tennessee is entitled to claim is presently unknown. The State of Tennessee has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess receipts.

However, it is probable that at least one issuer incorporated in the State of Tennessee has generated excess receipts and/or additional excess receipts. Moreover, it is virtually certain that bonds issued by Tennessee municipalities and other governmental entities have generated additional excess receipts subject to the claim of the State of Tennessee.

9. The State of Tennessee asserts its claim pursuant to Tennessee Code Annotated § 66-29-101, *et seq.*, which provides that any stock or other certificate of ownership or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bond holder, or other security holder, or a participating patron of a corporation, who has not claimed it within seven years after the date prescribed for payment is presumed abandoned and owing to the state if the business association is organized under the laws of or created in the State of Tennessee. *See* Tennessee Code Annotated § 66-29-107 (Supp. 1988). Moreover, all property in Tennessee not otherwise covered under any other provision of the Tennessee law including income or increment thereon that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven years is presumed abandoned and payable to the state. *See* Tennessee Code Annotated § 66-29-112 (Supp. 1988). The full text of Tennessee's Unclaimed Property Act is set forth in the appendix to this motion.

10. The State of Tennessee supports and adopts as if set forth fully by the State of Tennessee in its own pleadings the brief in support of motion for leave to file by Texas, and the factual and legal arguments set forth there-

in, to the extent the same are applicable and relevant to the claims of the State of Tennessee set forth in paragraph seven of this motion.

11. It is essential that the State of Tennessee be permitted to intervene in its own right in this proceeding. The decision of this Court will establish a rule of law which will conclusively determine the future right of the State of Tennessee to claim and take possession of unclaimed property similar or identical in nature to the excess receipts and additional excess receipts at issue in this case. Additionally, if the State of Tennessee is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those excess receipts and additional excess receipts attributable to issuers incorporated in the State of Tennessee. As a party, the State of Tennessee can obtain a ruling from this Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to the State of Tennessee.

12. Based on the foregoing, the State of Tennessee is entitled to intervene as a matter of right pursuant to which will conclusively determine the future right of the Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, the State of Tennessee urges this Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of the State of Tennessee in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve

as lead counsel for those states, including the State of Tennessee, wishing to intervene and represent themselves in this case. The addition of the State of Tennessee as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. This Court in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that this Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. *See also, Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claim that the State of Tennessee seeks by urging this Court to grant leave to intervene in this case.

THEREFORE, the State of Tennessee requests that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached complaint in intervention.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

MICHAEL W. CATALANO
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219-5025

No. 111 Original

—o—

In The

Supreme Court of the United States

October Term, 1988

—o—

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

—o—

COMPLAINT IN INTERVENTION

—o—

I.

INTRODUCTION

The State of Tennessee (Tennessee), the plaintiff in intervention, by Charles W. Burson, Attorney General and Reporter of the State of Tennessee, with leave first had, files this complaint in intervention in the above styled and numbered cause, and states as follows:

II.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the

United States and Section 1251 of Title 28 of the United States Code.

III.

PENDING ACTION

2. On May 31, 1988, this Court granted the plaintiff State of Delaware's (Delaware) motion for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant State of New York (New York) as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms in Delaware.

3. On February 21, 1989, this Court granted the State of Texas' (Texas) motion for leave to file a complaint in intervention. The Texas complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and non-brokerage firm intermediaries.

IV.

INTEREST AND CLAIM OF TENNESSEE

4. Tennessee acts by and through the Attorney General and Reporter of Tennessee, the official of Tennessee charged with the duty under the Constitution and laws of Tennessee of prosecuting unclaimed property suits and representing Tennessee in litigation generally.

5. Tennessee seeks a determination of its rights to certain of the unclaimed intangible personal property, referred to as "excess receipts" and "additional excess re-

ceipts" which comes into being and acquires its character as unclaimed property in the context of securities transactions.

6. Tennessee is entitled to a portion of the excess receipts and additional excess receipts at issue in this litigation because they constitute a debt of the entity (issuer) initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual (beneficial owner) who has the economic rights to the security, including the entitlement to distributions.

7. If the identity and location of the beneficial owner is unknown, the state of incorporation of the issuer should be entitled to collect the excess receipts and additional excess receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent so it should be similarly remitted to the state of incorporation of the issuer when held by other agents in the securities holding, transfer, and distribution system. Distributions generated by issuers incorporated in Tennessee and those generated by Tennessee which are unclaimed and whose beneficial owner is unknown, should be returned to Tennessee. The claim of Tennessee is based on the practical reality and manner in which securities are traded and distributions are paid, and relies upon a strict interpretation of the Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

8. By this action, Tennessee seeks a judgment that New York pay to Tennessee all excess receipts and additional excess receipts attributable to issuers incorporated in Tennessee and those that attributable to Tennessee mu-

nicipalities. Tennessee further seeks a declaration that it has the right in the future to claim and take possession of excess receipts and additional excess receipts without interference from any other state. Tennessee additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such excess receipts and additional excess receipts, and from expending any such sums collected, but presently unspent, which are attributable to issuers incorporated in Tennessee and to Tennessee municipalities, until such time as this controversy is resolved.

9. Tennessee asserts its claim pursuant to Tennessee Code Annotated § 66-29-101 *et seq.* (Supp. 1988) which provides, in essence, for the custodial taking of abandoned or unclaimed property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to such property has been asserted within the applicable dormancy period, which for most types of personal property in Tennessee is seven years.

V.

DEFINITIONS

10. Tennessee adopts by reference the definitions of the terms set forth by Texas in its intervening complaint on pages 12 through 17.

VI.

PRAYER FOR RELIEF

THEREFORE, Tennessee requests that this Court grant the following relief:

1. That Tennessee be allowed to intervene in this case to protect its interests;

2. That New York be restrained and enjoined from collecting any excess receipts and additional excess receipts attributable to issuers incorporated in Tennessee or attributable to Tennessee governmental issuers, and from expending any sums collected but presently unspent, consisting of such excess receipts and additional excess receipts, until such time as this controversy is resolved;

3. That New York be directed to pay or deliver to Tennessee all of the excess receipts and additional excess receipts paid or delivered to New York attributable to issuers incorporated in Tennessee and Tennessee governmental issuers which have been abandoned for the applicable dormancy period under Tennessee's Unclaimed Property Law.

4. That Tennessee be granted such other and further relief as the court deems just and equitable.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

MICHAEL W. CATALANO
Deputy Attorney General
State of Tennessee

[Counsel of Record]

450 James Robertson Parkway
Nashville, Tennessee 37219-5025

APPENDIX

UNIFORM DISPOSITION OF UNCLAIMED [PERSONAL] PROPERTY ACT

66-29-101. *Short title.*

66-29-102. *Definitions.*—As used in this part, unless the context otherwise requires:

(1) "Banking organization" means any national bank or state bank, trust company, savings bank, industrial bank, land bank, safe deposit company, or private banker;

(2) "Business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership cooperative, or any association for business purposes of two (2) or more individuals;

(3) "Financial organization" means any savings and loan association, building and loan association, credit union, cooperative bank, or investment company;

(4) "Holder" means any person in possession of property subject to this chapter belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this chapter.

(5) "Life insurance corporation" means any association or corporation transacting the business of insurance on the lives of persons or insurance appertaining thereto, including, but not by way of limitation, endowments and annuities;

(6) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this chapter, or his or her legal representative;

(7) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity, whether such person is acting in his or her own right or in a representative or fiduciary capacity;

(8) "Property" means tangible personalty located in this state and all intangible personalty;

(9) "Treasurer" means the treasurer of the state of Tennessee;

(10) "Utility" means any person who owns or operates for public use, any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas; and

(11) "Local government" means any municipality or county located in Tennessee.

66-29-103. *General rules for taking custody of intangible unclaimed property.*—Unless otherwise provided in this part or by other statute of this state, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under this section or §§ 66-29-104—66-29-111 are satisfied and:

(1) The last known address, as shown on the records of the holder, of the apparent owner is in this state;

(2) The records of the holder do not reflect the identity of the person entitled to the property and it is estab-

lished that the last known address of the person entitled to the property is in this state;

(3) The records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(A) The last known address of the person entitled to the property is in this state; or

(B) The holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) The last known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(5) The last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this state; or

(6) The transaction out of which the property arose occurred in this state; and

(A)(i) The last known address of the apparent owner or other person entitled to the property is unknown; or

(ii) The last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and

(B) The holder is a domiciliary of a state that does not provide by law the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property .

66-29-104. *Property held by banking or financial organizations or by business associations.*—The following property held or owing by a banking or financial organization or by a business association is presumed abandoned;

(1) Any demand, savings, or matured time deposit made with a banking organization, together with any interest or dividend thereon, excluding any charges that may lawfully be withheld, unless the owner has, within seven (7) years:

(A) Increased or decreased the amount of the deposit, or presented the passbook or other similar evidence of the deposit for the crediting of interest;

(B) Corresponded in writing with the banking organization concerning the deposit; or

(C) Otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization, providing such memorandum is one which is routinely kept according to customary banking practices;

(2) Any funds paid toward the purchase of shares or other interest in a financial organization or any deposit

made therewith, and any interest or dividends thereon excluding any charges that may lawfully be withheld, unless the owner has within seven (7) years:

(A) Increased or decreased the amount of the funds or deposit or presented an appropriate record for the crediting of interest or dividends;

(B) Corresponded in writing with the financial organization concerning the funds or deposit; or

(C) Otherwise indicated an interest in the funds or deposit as evidenced by a memorandum on file with the financial organization;

(3)(A) Any sum payable on checks certified or on written instruments issued on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, certificates of deposit, drafts, money orders, and traveler's checks, that, with the exception of traveler's checks, has been outstanding for more than seven (7) years from the date it was payable, or from the date of its issuance if payable on demand, or, in the case of traveler's checks, that has been outstanding for more than fifteen (15) years from the date of its issuance, unless the owner has within the time period corresponded in writing with the banking or financial organization or business association concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization or business association;

(8) Provided however, no sum payable on a traveler's check, money order or similar written in-

strument, other than a third-party bank check, may be subjected to the custody of the state as unclaimed property unless:

(i) The records of the issuer show that the traveler's check, money order or similar written instrument was purchased in this state;

(ii) The issuer has its principal place of business in this state and the records of the issuer do not show the state in which the traveler's check, money order or similar written instrument was purchased; or

(iii) The issuer has its principal place of business in this state and the records of the issuer show the state in which the traveler's check, money order or similar written instrument was purchased and the laws of the state of purchase do not provide for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property;

(4)(A) Any surplus amount resulting from the sale of safe deposit box contents by banking institutions pursuant to § 45-2-907, if the proceeds cannot be credited to an existing customer account within one (1) year. Any credit of these proceeds to a customer account will not be considered as account activity under subdivisions (1) and (2) above;

(B) For activity not governed by § 45-2-907, any funds or other personal property removed from a safe deposit box or any other safekeeping repository or agency or collateral deposit box on which the lease or rental period has expired due to nonpayment of rental

charges or other reason that have been unclaimed by the owner for more than two (2) years from the date on which the lease or rental period expired; or any surplus amount arising from the sale thereof pursuant to law that has been unclaimed by the owner for one (1) year; and

(5) Property described above, without regard to any activity or inactivity within specified abandonment periods, whose owner is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

66-29-105. *Unclaimed funds held by life insurance corporations.*—(a) Unclaimed funds held and owing by a life insurance corporation shall be presumed abandoned if the provisions of this section and § 66-29-103 are satisfied. If a person other than the insured or annuitant is entitled to the funds and no address of such person is known to the corporation or if it is not definite and certain from the records of the corporation what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the corporation.

(b)(1) "Unclaimed funds," as used in this section, means all moneys held and owing by any life insurance corporation unclaimed and unpaid for more than seven (7) years after the moneys became due and payable as established from the records of the corporation under any life or endowment insurance policy or annuity contract which has matured or terminated. A life insurance policy not

matured by actual proof of the death of the insured is deemed to be matured and the proceeds thereof are deemed to be due and payable if such policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based, unless the person appearing entitled thereto has within the preceding seven (7) years:

(A) Assigned, readjusted, or paid premiums on the policy, or subjected the policy to loan; or

(B) Corresponded in writing with the life insurance corporation concerning the policy.

Moneys otherwise payable according to the records of the corporation are deemed due and payable although the policy or contract has not been surrendered as required.

(2) "Unclaimed funds" shall also include all moneys held and owing by any life insurance corporation under this subdivision to any owner who is known to the company to have died and left no one to take such moneys by will and no one to take such moneys by intestate succession.

66-29-106. *Undistributed assets and obligations of business associations and utilities.*—(a) The following funds held or owing by any utility are presumed abandoned:

(1) Any deposit made by a subscriber with a utility to secure payment, any sum overpaid, or any sum paid in advance for utility services to be furnished, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than seven (7) years after the termination of the services for which the deposit, overpayment, or advance payment was made;

(2) Any sum which a utility has been ordered to refund to a subscriber and which was received for utility services rendered together with any interest thereon, less any lawful deductions, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than seven (7) years after the date it became payable in accordance with the final determination or order providing for the refund; and

(3) Property described above, without regard to any activity or inactivity within specified abandonment periods, whose owner is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

(b) Any utility which possesses a deposit or other sum which is subject to be presumed abandoned pursuant to the provisions of subsection (a) shall make a reasonable attempt to notify the subscriber who is entitled to such deposit or sum of such possession within three (3) years of the commencement of the seven (7) year period pursuant to subsection (a).

66-29-107. *Undistributed dividends and distributions of business associations.*—Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within seven (7) years after the date prescribed for payment or delivery is presumed abandoned. Property described above, without regard to any activity

or inactivity within the past seven (7) years, shall also be presumed abandoned if the owner thereof is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

66-29-108. *Property of business associations and banking or financial organizations held in course of dissolution.*—All intangible personal property distributable in the course of a voluntary or involuntary dissolution or liquidation of a business association, banking organization, or financial organization that is unclaimed by the owner after the date for final distribution or liquidation is presumed abandoned.

66-29-108. *Property held by fiduciaries.*—All property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has within seven (7) years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary. Property described above, without regard to any activity or inactivity within the past seven (7) years, shall also be presumed abandoned if the owner thereof is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

66-29-110. *Property held by courts, public officers and agencies.*—All property held for the owner by any court, including a federal court, public corporation, public authority or agency, or public officer, or a political sub-

division, that has remained unclaimed by the owner for more than seven (7) years is presumed abandoned, except property in the custody or control of any state or federal court in any pending action or property which is otherwise disposed of by law. Property described above, without regard to any activity or inactivity within the past seven (7) years, shall also be presumed abandoned if the owner thereof is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

66-29-111. *Property held by federal government.*—All property including choses in action in sums certain, and all debts owed, entrusted funds, or other property held by the federal government, or any agency, officer or appointee thereof, is presumed abandoned if the property has been unclaimed for at least seven (7) years. The federal government or a governmental officer or appointee thereof may deduct from the amount paid or delivered to the state treasurer the proportionate share of the actual and necessary cost of examining such records and reporting such information. This state shall hold the federal government harmless to the extent of the value of any property so paid or delivered from any claim which then exists or which thereafter may arise or be made in respect to property delivered to the state treasurer by the federal government. Property described above, without regard to any activity or inactivity within the past seven (7) years, shall also be presumed abandoned if the owner thereof is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

66-29-112. *Miscellaneous property held for another person.*—All property, not otherwise covered by this part, including any income or increment thereon and deducting any lawful charges, that is held or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven (7) years after it became payable or distributable is presumed abandoned. Provided, however, that a layaway account of any retail business association shall not be considered as miscellaneous property held for another person and such accounts shall not be regulated by this part. Property described above, without regard to any activity or inactivity within the past seven (7) years, shall also be presumed abandoned if the owner thereof is known to the holder to have died and left no one to take his property by will and no one to take his property by intestate succession.

66-29-113. *Report of abandoned property.*—(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this part shall report to the treasurer with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) Except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of twenty-five dollars ($25.00) or more presumed abandoned under this part;

(2) In case of unclaimed funds of a life insurance corporation, the full name of the insured or annuitant and

his last known address according to the life insurance corporation's records;

(3) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under twenty-five dollars ($25.00) each may be reported in aggregate;

(4) Except for property reported in the aggregate, the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) Other information which the treasurer prescribes by rule as necessary for the administration of this part.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before May 1 of each year, reporting property held as of the previous December 31. The treasurer may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this part knows the whereabouts of the owner the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

The treasurer shall promulgate rules and regulations to clarify the provisions of this subsection with respect to the duties of holders.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(g) The treasurer shall keep a record of all reports submitted to him.

66-29-114. *Notice and publication of lists of abandoned property.*—(a) The treasurer shall have notice published of the names and last known addresses of the apparent owners of property in a manner designed to inform owners that property has been reported under the law and where further information on the property may be obtained.

(b) Such notice shall contain a statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction within sixty-five (65) days from a date set by the treasurer, the abandoned property will be placed not later than eighty-five (85) days after such date in the custody of the treasurer to whom all further claims must thereafter be directed.

(c) The treasurer may set a minimum dollar value for items to be advertised which takes into consideration the cost of advertising and the interests of the owners of property. Property which is not advertised shall be accumulated in an organized fashion and shall be made available to the public.

(d) Within one hundred twenty (120) days from the final payment or delivery of abandoned property required by § 66-29-115, the treasurer shall mail a notice to each person having an address reported who appears to be entitled to property of the value of twenty-five dollars ($25.00) or more presumed abandoned under this part.

(e) The mailed notice shall contain:

(1) A statement that, according to a report filed with the treasurer, property is being held to which the addressee appears entitled; and

(2) A statement that the property is in the custody of the treasurer and will be held for the owner until satisfactory proof of claim is presented.

(f) This section is not applicable to sums payable on traveler's checks or money orders presumed abandoned under § 66-29-103.

66-29-115. *Payment or delivery of abandoned property.*—(a) Except as provided in subsection (b), every person who has filed a report under § 66-29-113, within twenty (20) days after the time specified in § 66-29-114 for claiming the property from the holder, or in the case of sums payable on traveler's checks or money orders presumed abandoned under § 66-29-104 within twenty (20) days after the filing of the report, shall pay or deliver to the treasurer all abandoned property specified in this report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in § 66-29-114, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver

the property, which will no longer be presumed abandoned, to the treasurer, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(b) Contents removed from any safe deposit box or any other safekeeping repository or agency or collateral deposit box described in § 66-29-104(4)(B), shall be sold or disposed of by the holder in accordance with the procedures set forth in § 45-2-907, or pursuant to instructions received from the treasurer and the proceeds, less reasonable costs of sale and storage, shall be remitted within sixty (60) days of sale.

66-29-116. *Relief from liability by payment or delivery.*—Upon the payment or delivery of abandoned property to the treasurer, the state shall assume custody and shall be responsible for the safekeeping thereof. Any person who pays or delivers abandoned property to the treasurer under this chapter is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property. Any holder who has paid moneys to the treasurer pursuant to this chapter may make payment to any person appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the treasurer shall forthwith reimburse the holder for the payment.

66-29-117. *Income accruing after payment or delivery.*—(a) When noninterest-bearing property is paid or delivered to the treasurer under this chapter, the owner

is not entitled to receive income or other increments accruing thereafter.

(b) When interest-bearing property is paid or delivered to the treasurer under this chapter, the owner is entitled to receive interest accruing thereafter under the following conditions:

(1) Interest will be paid at the stated rate the property was earning at the time it was turned over to the treasurer; and,

(2) Interest will be computed by the treasurer at the time a valid claim is established by the owner. The interest will be compounded annually.

66-29-118. *Periods of limitation not a bar.*—The expiration of any period of time specified by statute or court order, during an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by this chapter or to pay or deliver abandoned property to the treasurer.

66-29-119. *Sale of abandoned property.*—(a) All abandoned property delivered to the treasurer under this part other than money or property of a type customarily sold in a recognized market, or of a type which is the subject of widely distributed price quotations, may be sold by the treasurer, in accordance with procedures approved by the attorney general, to the highest bidder at public sale at whatever place affords in his judgment the most favorable price for the property involved, or may be disposed of by the treasurer pursuant to § 12-2-112 if real property,

or the State Surplus Personal Property Act of 1976, compiled in §§ 12-2-401—12-2-414, as amended. United States government savings bonds and United States war bonds shall be presented to the United States for payment.

(b) Property of a type customarily sold in a recognized market, or a type which is the subject of widely distributed price quotations, shall, within one (1) year after delivery be sold by the treasurer in accordance with the customs prevailing for the sale of such property at the price considered most advantageous by the treasurer.

(c) Any sale of abandoned property, other than property sold under subsection (b) of this section, held by the treasurer under this section shall be preceded by a single publication of notice thereof at least three (3) weeks in advance of the sale, in a newspaper having general circulation in the county where the property is sold.

(d) The purchaser at any sale conducted by the treasurer pursuant to this part shall receive title to the property purchased free from all claims of the owner or prior holder thereof, and of all persons claiming under or through them. The treasurer or his duly designated agent shall execute all documents necessary to complete the transfer of title.

66 29 120. *Disposition of property having no commercial value.* Any property delivered to the treasurer pursuant to this chapter which has no apparent commercial value shall be retained by the treasurer until such time as he determines to destroy or otherwise dispose of it. Prior to the destruction or disposal of any such property, the determination of the treasurer shall be ap-

proved by the commissioner of general services and the attorney general. Once the destruction or disposition of the property has been approved, the treasurer may at any time thereafter destroy or otherwise dispose of such property, and in that event, no action or proceeding shall be brought or maintained against the state or any officer thereof for or on account of any action taken by the treasurer pursuant to this chapter with respect to such property.

66-29-121. *Disposition of funds.*—(a) Except as provided in subsection (c), all funds received under this part, including the proceeds from the sale of abandoned property under § 66-29-119 shall forthwith be deposited by the treasurer in the general funds of the state, except that the treasurer shall retain in a separate trust account an amount not exceeding one hundred fifty thousand dollars ($150,000) from which he shall make prompt payment of claims duly allowed by him as hereinafter provided. Before making the deposit he shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and of the name and last known address of each insured person or annuitant, and with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation, and the amount due. The record shall be available for public inspection at all reasonable business hours.

(b) The treasurer is further authorized to expend from the hereinabove created trust account sufficient funds to meet any costs in connection with the acquisition or sale of abandoned property and any costs of mailing and publication in connection with any abandoned property.

(c) For funds received under this part for the report year ending December 31, 1985 and thereafter, the treasurer shall determine each June 30 the amount of such funds remitted by or on behalf of each local government of the state and its agencies which have remained unclaimed for a minimum of eighteen (18) months following their delivery to the treasurer. Provided the aggregate unclaimed balance exceeds one hundred dollars ($100), the treasurer upon request of the local government shall pay an amount equal to the aggregate unclaimed balance, less a proportionate share of the cost of administering the program as determined by the treasurer, to the local government, together with a report of the accounts represented by the funds. These funds shall be placed in the local government's general fund, except the local government shall maintain to the extent necessary a sufficient amount of the total unclaimed property accounts to insure prompt payment as hereinafter provided.

66-29-122. *Agreements to locate reported property.*— (a) The treasurer shall approve all contracts entered between two (2) or more persons whereby one (1) party to the contract agrees to furnish the other party with information concerning property reported to the treasurer under this part; provided, however, that no contract shall be approved until the property that is the subject of such contract has been held by the treasurer for a period of one (1) year from the date advertised by the treasurer.

(b) In all instances where the treasurer is not a party to the contract, the agreed upon fee in such other contracts shall not exceed ten percent (10%) of the value of the recoverable property or fifty dollars ($50.00), whichever is greater.

(c) Nothing in this section shall be construed to prevent an owner from asserting at any time that an agreement to locate property is based upon an excessive or unjust consideration.

66-29-123. *Claims for abandoned property paid or delivered—Determination.*—(a) Except as provided in subsection (d), any person claiming an interest in any property delivered to the state under this part may file a claim thereto or to the proceeds from the sale thereof on the form prescribed by the treasurer.

(b) The treasurer shall consider any claim filed under this part within ninety (90) days and may hold a hearing and receive evidence concerning it. If a hearing is held, he shall prepare a finding and a decision in writing on each claim filed, stating the substance of any evidence heard by him and the reasons for his decision. The decision shall be a public record.

(c) If the claim is allowed, the treasurer shall make forthwith. The claim shall be paid without deduction for costs of notices or sale or for service charges.

(d) Any person claiming an interest in any property for which funds have been delivered by the treasurer to a local government pursuant to § 66-29-121 may file a claim thereto with the local government in receipt of the funds. If the claim is allowed, the local government shall make payment forthwith, without deduction for administrative cost or service charges. Any person aggrieved by a finding of the local government may appeal to the treasurer in accordance with subsection (b). If the treasurer finds the claim to be valid, the local government shall issue pay-

ment forthwith. The local government shall submit an annual report of claims received on a form prescribed by the treasurer. This report shall be filed before September 1, reporting claims received as of the previous June 30.

66-29-124. *Claim of another state to recover property—Procedure.*—(a) At any time after property has been paid or delivered to the treasurer under this part another state may recover the property if:

(1) The property was subjected to custody by this state because the records of the holder did not reflect the last known address of the apparent owner when the property was presumed abandoned under this part, and the other state establishes that the last known address of the apparent owner or other person entitled to the property was in that state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(2) The last known address of the apparent owner or other person entitled to the property, as reflected by the records of the holder, is in the other state and under the laws of that state the property has escheated to or become subject to a claim of abandonment by that state;

(3) The records of the holder were erroneous in that they did not accurately reflect the actual owner of the property, and the last known address of the actual owner is in the other state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(4) The property was subjected to custody by this state under § 66-29-103(6) and under the laws of the state

of domicile of the holder the property has escheated to or become subject to a claim of abandonment by that state; or

(5) The property is the sum payable on a traveler's check, money order, or other similar instrument that was subjected to custody by this state under § 66-29-103 and the instrument was purchased in the other state, and under the laws of that state the property escheated to or became subject to a claim of abandonment by that state.

(b) The claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the treasurer who shall decide the claim within ninety (90) days after it is presented. The treasurer shall allow the claim if he determines that the other state is entitled to the abandoned property under subsection (a).

(c) The treasurer shall require a state, before recovering property under this section, to agree to indemnify this state and its officers and employees against any liability on a claim for the property.

66-29-125. *Judicial action upon determination.*—Any person aggrieved by a finding of the treasurer under § 66-29-123 or upon whose claim the treasurer has failed to act upon ninety (90) days after the filing thereof, may file a complaint to establish his claim in the chancery court for Davidson County, naming the treasurer as a defendant and joining any other persons who may have an interest in the subject property. The suit shall be brought within ninety (90) days after the decision of the treasurer, or within one hundred eighty (180) days from the date of the filing of the claim, if the treasurer fails to act within such ninety (90) days. A copy of the complaint shall also

be served on the attorney general. The suit shall be tried without a jury. If a decree is rendered against the treasurer, he shall make payment in accordance therewith as provided in § 66-29-123. Any aggrieved party may appeal the decision.

66-29-126. *Election to take payment or delivery.*—The treasurer, after receiving reports of property deemed abandoned pursuant to this part, may decline to receive any property reported which he deems to have a value less than the cost of giving notice and holding sale, or he may, if he deems it desirable because of the small sum involved, postpone taking possession until a sufficient sum accumulates. Unless the holder of the property is notified to the contrary within one hundred twenty (120) days after filing the report required under § 66-29-113, the treasurer shall be deemed to have elected to receive custody of the property.

66-29-127. *Examination of record.*—(a) The treasurer may at reasonable times and upon reasonable notice examine the records of any person if he has reason to believe that such person has failed to report property that should have been reported pursuant to this part.

(b) The comptroller of the treasury and the various regulatory and taxing agencies of this state shall report to the treasurer any property presumed to be abandoned under this part, held by any person subject to their supervision, regulation, or examination.

66-29-128. *Proceedings to compel delivery of abandoned property.*—If any person refuses to deliver property to the treasurer as required under this part, he shall

bring an action in a court of appropriate jurisdiction to enforce such delivery.

66-29-129. *Penalties.*—(a) Any person who willfully fails to render any report or perform other duties required under this part, shall be punished by a fine of twenty-five dollars ($25.00) for each day such report is withheld, but not more than one thousand dollars ($1,000).

(b) Any person who willfully refuses to pay or deliver abandoned property to the treasurer as required under this part shall be punished by a fine of not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000).

66-29-130. *Rules and regulations.*—The treasurer is hereby authorized to make necessary rules and regulations to carry out the provisions of this part.

66-29-131. *Effect of laws of other states.*—This part shall not apply to any property that has been presumed abandoned or escheated under the laws of another state prior to March 6, 1978.

66-29-132. *Effect on other Tennessee statute.*—(a) In the event that the provisions of this Uniform Disposition of Unclaimed Property Act are in conflict with other provisions of state law, the provisions contained herein will prevail so as to effectuate the intent of this part. Provided, however, that in the event the provisions of this part are in conflict with the provisions of chapter 16 of title 55, the provisions contained in chapter 16 of title 55 will prevail, it being the intent of the legislature that chapter 16 of title 55 will continue to govern unclaimed or abandoned motor vehicles.

(b) Specific note has been taken of the provisions of §§ 31-822—31-829 [repealed], and it is the intent of the legislature that these sections will continue to govern the disposition of unclaimed real property.

(c) Chapter 16 of title 55 governing unclaimed or abandoned motor vehicles, is hereby considered, ratified, and affirmed as if specifically reenacted.

66-29-133. *Uniformity of interpretation.*—This part shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it. Provided, however, nothing in this part shall be construed as superseding any of the provisions of chapter 16 of title 55.

66-29-134. *Agents for enforcement of chapter.*—The treasurer may appoint agents within this state or outside this state for the purpose of carrying out the provisions of this part.

Supreme Court, U.S.
FILED
MAY 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF WISCONSIN FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION

DONALD J. HANAWAY
Attorney General of
Wisconsin

DANIEL D. STIER
Assistant Attorney
General
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3067

TABLE OF CONTENTS

Page

MOTION OF THE STATE OF WISCONSIN FOR LEAVE TO INTERVENE 1

TABLE OF AUTHORITIES

Cases Cited

Pennsylvania v. New York, 407 U.S. 206 (1972) 10

Western Union Tel. Co. v. Commonwealth of Pa., 368 U.S. 71 (1961) 10

Statute and Rules Cited

Ch. 177, Wis. Stats. 6

Rule 24(a)(2), Federal Rules of Civil Procedure 9

Rule 24(b), Federal Rules of Civil Procedure 9

Page

TABLE OF CONTENTS

COMPLAINT IN INTERVENTION 12

I. JURISDICTION. 13

II. PENDING ACTION. 13

III. INTEREST AND CLAIM OF PLAINTIFF IN INTERVENTION. . 14

IV. DEFINITIONS. 20

V. BACKGROUND. 30

VI. CLAIMS OF DELAWARE AND NEW YORK. 37

VII. CLAIM OF WISCONSIN. 41

VIII. DESCRIPTION OF THE DISTRIBUTION SYSTEM: PHYSICAL CERTIFICATES. . . . 42

DESCRIPTION OF DISTRIBUTION SYSTEM: BOOK ENTRY CERTIFICATE SYSTEM 51

IX. PLAINTIFF IN INTERVENTION'S ANALYSIS OF RIGHTS AND RELATIONSHIPS. 54

X. SPECIFIC PROPERTY CLAIMED BY PLAINTIFF IN INTERVENTION. . 56

XI. ADDITIONAL EXCESS RECEIPTS. . 58

XII. ADDITIONAL EXCESS RECEIPTS HELD BY DTC. 60

Page

XIII. ADDITIONAL EXCESS RECEIPTS ATTRIBUTABLE TO GOVERNMENT ISSUES. 63

XIV. PROPRIETY OF CONSIDERING ADDITIONAL EXCESS RECEIPTS. . 65

XV. MERITS OF CLAIM ASSERTED AND RESOLUTION URGED BY PLAINTIFF IN INTERVENTION. . 67

PROOF OF SERVICE 75

TABLE OF AUTHORITIES

Cases Cited

Pennsylvania v. New York, 407 U.S. 206 (1972) . . . 37, 41, 67

State of Texas v. State of New Jersey, 379 U.S. 674 (1965) . . 19, 37, 41, 56, 62, 67

Statute Cited

Ch. 177, Wis. Stats. 20, 73

Constitutional Provision

United States Constitution, article III, section 2 13

Page

Other Authorities

15 U.S.C. §§ 78aaa.-78111. (1981) . . 35

28 U.S.C. § 1251 (1966) 13

New York Abandoned Property Law
§ 300 (McKinney Supp. 1988) . . . 63

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF WISCONSIN
FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Wisconsin ("Wisconsin"), a sovereign state of the United States of America, by and through Attorney General Donald J. Hanaway and Assistant Attorney General Daniel D. Stier, moves the Court for an order

permitting it to intervene as plaintiff in the above-entitled cause, and permitting its proposed Complaint in Intervention attached hereto, to be filed in this action. The Complaint is essentially identical to the Complaint in Intervention earlier filed in this action by the State of Texas. In support of this motion, Wisconsin would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed

intangible personal property, consisting of moneys and other intangible personal property ("Excess Receipts"),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master in this case.

3. On or about February 21, 1989, the Court granted the Motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its Complaint in Intervention in this case.

4. As set forth in detail in its Complaint, Texas claims a portion of the Excess Receipts which constitute the subject matter of the original

---

[1]In its Complaint in Intervention, Texas has defined certain terms. Wisconsin incorporates those definitions herein by reference.

controversy between Delaware and New York, specifically, that portion of Excess Receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to Issuers incorporated in Texas.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to Issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts which have arisen in connection with Distributions made by Texas municipal and other governmental Issuers ("Additional Excess Receipts") which are now being demanded by or remitted to New York. It is Wisconsin's understanding that the Court intends to consider claims to both the Excess Receipts originally at issue and the

Additional Excess Receipts identified by Texas.

6. Texas claims a portion of the Excess Receipts and the Additional Excess Receipts for the reason that they constitute a debt owed by the Issuer to the securities' Beneficial Owner. If the identity of the Beneficial Owner is unknown, the Excess Receipts and Additional Excess Receipts should be remitted to the state of incorporation of the Issuer under the state's unclaimed property law.

7. Wisconsin claims a portion of the Excess Receipts and Additional Excess Receipts at issue in this action, specifically, that portion of the Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in Wisconsin and that portion attributable

to Wisconsin municipalities and other governmental entities.

8. The amount of Excess Receipts and Additional Excess Receipts that Wisconsin is entitled to claim is presently unknown. Wisconsin has never, prior to this lawsuit, had any reason to identify and quantify such Excess Receipts and Additional Excess Receipts. However, it is probable that at lease one Issuer incorporated in Wisconsin has generated Excess Receipts and Additional Excess Receipts. Moreover, it is a virtual certainty that bonds issued by Wisconsin municipalities and other governmental entities have generated Additional Excess Receipts subject to the claim of Wisconsin.

9. Wisconsin asserts its claim pursuant to ch. 177, Wis. Stats., which provides, in essence, for the custodial

taking of abandoned or unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to the property has been asserted within the applicable dormancy period, which for most types of personal property is five years.

10. Wisconsin supports and adopts as if fully set forth by Wisconsin in its own pleadings Texas' Brief in Support of Motion for Leave to File, and the factual and legal arguments set forth therein, to the extent same are applicable and relevant to the claims of Wisconsin set forth in Paragraph 7 above.

11. It is essential that Wisconsin be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law

which will conclusively determine the future right of Wisconsin to claim and take possession of unclaimed property similar or identical in nature to the Excess Receipts and Additional Excess Receipts at issue herein. Additionally, if Wisconsin is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in Wisconsin. As a party, Wisconsin can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to Wisconsin.

12. Based on the foregoing, Wisconsin is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Wisconsin urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

13. The intervention of Wisconsin in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including Wisconsin, wishing to intervene and represent themselves in this case. The addition of Wisconsin as a Plaintiff in Intervention will not result, therefore,

in an unmanageable increase in the number of parties to this litigation.

14. The Court, in Western Union Tel. Co. v. Commonwealth of Pa., 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the States that want to do so can present their claims for consideration and final authoritative determination." Id. at 79. See also Pennsylvania v. New York, 407 U.S. 206 (1972). It is such an opportunity to present its claim that Wisconsin seeks by urging this Court to grant leave to intervene herein.

Wherefore, Wisconsin prays that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached Complaint in Intervention.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General of
Wisconsin

DANIEL D. STIER
Assistant Attorney
General
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3067

May, 1989

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

COMPLAINT IN INTERVENTION

The State of Wisconsin, Plaintiff in Intervention, by Donald J. Hanaway, its Attorney General, with leave of the Court first had, files this Complaint in Intervention in the above styled and numbered cause. This Complaint in

Intervention is essentially identical to the Complaint in Intervention previously filed by the State of Texas. The State of Wisconsin complains and alleges as follows:

I. JURISDICTION.

1. The original jurisdiction of this Court is invoked under article III, section 2 of the United States Constitution and 28 U.S.C. § 1251 (1966).

II. PENDING ACTION.

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and

other intangible property held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, the Court granted the motion of the State of Texas ("Texas") for leave to file a complaint in intervention.

III. INTEREST AND CLAIM OF PLAINTIFF IN INTERVENTION.

4. Plaintiff in Intervention, the State of Wisconsin, acts by and through the Attorney General of Wisconsin, the official of the State of Wisconsin charged with the duty under the Constitution and the laws of the State of prosecuting unclaimed property suits at the request of the Governor and the Treasurer of the State of Wisconsin and

of representing the State of Wisconsin in litigation generally.

5. At present, this litigation involves a dispute as to which state is entitled to the custodial taking of certain unclaimed, intangible personal property ("Excess Receipts"), which comes into being and acquires its character as unclaimed property in the context of securities transactions. The Excess Receipts consist of unclaimed payments of dividends, profits, principal, interest and securities representing any of the foregoing ("Distributions"), held or formerly held by brokerage firms incorporated in Delaware. The Excess Receipts are Distributions received by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled. The Excess Receipts are usually maintained in a "Suspense Account" until

expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

6. Plaintiff in Intervention claims a portion of the Excess Receipts. Additionally, Plaintiff in Intervention seeks to have this Court consider and determine rights to certain additional Excess Receipts ("Additional Excess Receipts") which are not yet part of this litigation which involves the same issues. These Additional Excess Receipts consist of: (a) excess receipts presently being remitted to New York which are held by the Depository Trust Company ("DTC"), a national clearinghouse for the settlement of trades in corporate and municipal securities; and (b) excess receipts arising from unclaimed principal and interest payments on municipal and state bonds which have never been remitted to any state.

Additional Excess Receipts are of the same character and come into existence in the exact same manner as the Excess Receipts at issue in the principal case and will necessarily be controlled by the Court's ruling in this case.

7. Wisconsin is entitled to a portion of the Excess Receipts at issue in this litigation (and to a portion of the Additional Excess Receipts it seeks to have the Court consider) because they constitute a debt of the entity ("Issuer") initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ("Beneficial Owner") who has the economic rights to the security, including the entitlement to Distributions.

8. If the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be

entitled to collect the Excess Receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the Issuer's state of incorporation when held by the Issuer's Paying Agent (defined in part IV) so it should be similarly remitted to the state of incorporation of the Issuer when held by other agents in the securities holding, transfer and distribution system ("Distribution System"). Distributions generated by Issuers incorporated in the State of Wisconsin and those generated by Wisconsin municipalities which are unclaimed and whose Beneficial Owner is unknown, should be returned to the State of Wisconsin. The claim of Plaintiff in Intervention is based upon the practical reality of the manner in which securities are traded and Distributions are paid, and relies upon a strict interpretation of this

Court's holding in State of Texas v. State of New Jersey, 379 U.S. 674 (1965).

9. By this action, Plaintiff in Intervention seeks a judgment that New York pay to Plaintiff in Intervention all Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Wisconsin and those that are attributable to Wisconsin municipalities. Plaintiff in Intervention further seeks a declaration that Wisconsin has the right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts without interference from any other state. Plaintiff in Intervention additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such Excess Receipts and Additional Excess Receipts, and from expending any such sums collected, but presently unspent, which are

attributable to Issuers incorporated in the State of Wisconsin and to Wisconsin municipalities, until such time as this controversy is resolved.

10. Plaintiff in Intervention asserts its claim pursuant to ch. 177, Wis. Stats.; which provides, in essence, for the custodial taking of abandoned or unclaimed intangible personal property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to said property has been asserted within the applicable dormancy period, which for most types of personal property is five years.

IV. DEFINITIONS.

11. The process by which securities Distributions are made and which gives rise to the Excess Receipts is complex. Because the process has evolved within the last

twenty years, it has not been extensively studied and is generally understood only by persons who work within the Distribution System. In order to assist the Court, Plaintiff in Intervention refers the Court to the charts attached to the Texas Complaint as Exhibits "1" and "2." For the Court's further convenience, Plaintiff in Intervention will use the following definitions previously assembled by Texas throughout the remainder of this Complaint.

"Additional Excess Receipts" means Distributions received by DTC for the benefit of DTC Participants which exceeds the amount paid to DTC Participants. These funds are maintained in the "Unclaimed Dividends Account" at DTC until after the expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York. "Additional Excess Receipts" also means

unclaimed principal and interest payments of bonds, debentures or other debt obligations attributable to corporate and Governmental Issuers. "Beneficial Owner" or "Customer" means an entity or individual who acquires and owns the economic rights with respect to a security, including entitlement to Distributions, and the power to sell or dispose of the security.

"Book Entry Accounting" means the computerized accounting process by which ownership interests in securities are recorded and Distributions are proportionally allocated and recorded.

"Book Entry Certificate System" means the process of reflecting the ownership of securities only through computerized notations in the books and records. In this Book Entry Certificate System the Issuer initially issues a single Physical Certificate (or one Physical Certificate for

each maturity and interest rate) in the name of DTC or Cede & Co., its Nominee. Cede & Co. is the only Record Owner, as reflected on the Issuer's books and records. Thereafter, all ownership of securities is evidenced by a computer printout confirmation statement of a securities transaction ("Book Entry Certificate"), rather than by possession of a Physical Certificate.

"Cede & Co." is the principal Nominee used by the Depository Trust Company.

"Depository Trust Company" ("DTC") is a trust company incorporated under the banking laws of New York, and is the national clearing house created by the brokerage firms and banks in cooperation

with the New York Stock Exchange.[1] As a clearinghouse, it provides a system for the settlement of trades in corporate and municipal securities between brokerage firms without the delivery of Physical Certificates. It also provides a system for the collection and disbursement of Distributions for the ultimate benefit of Beneficial Owners or Customers by making federal wire transfers to banks for the accounts of DTC Participants. DTC is the principal Intermediary in the modern Distribution System. Access to the Depository Trust Company is limited solely to DTC Participants.

"Distributions" means payments of dividends, profits, principal, interest and

---

[1]Plaintiff in Intervention believes that the Depository Trust Company is one of two clearinghouses operating in the United States. Any reference to the Depository Trust Company or DTC shall mean and include all clearinghouses.

securities representing any of the foregoing.

"Distribution System" means the chain of transactions between the Issuer and the Beneficial Owner, which includes all Intermediaries in the trading of securities and the receipt and disbursement of Distributions.

"DTC Participant" means the brokerage firms and banks who are members of the Depository Trust Company.[2] All of the brokerage firms identified by Delaware in its Complaint are DTC Participants.

"Excess Receipts" means Distributions received by brokerage firms incorporated in Delaware for the benefit of their Customers which exceeds the amounts which the

---

[2]DTC Participants as of December 31, 1987, are listed in the DTC Annual Report. Wisconsin is informed that a copy of the report has previously been filed with the Clerk.

brokerage firms are entitled. These funds are usually maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time, under current practice, they are remitted to New York.

"Ex Dividend Date" or "Ex Date" is the date determined pursuant to rules of the securities exchanges and the National Association of Securities Dealers to establish whether a buyer or seller of securities is entitled to a Distribution that has been previously announced but not as yet paid. Under these rules, Ex Dividend Date is five business days before the Record Date. Buyers of securities in transactions that occur before the Ex Dividend Date are entitled to the Distribution; buyers of securities in transactions that occur on or after the Ex Dividend Date are not entitled

to the distributions even though they might own the securities on the Record Date.

"Governmental Issuer" is a state or any political subdivision thereof authorized under state law to issue municipal bonds, notes or other obligations.

"Intermediary" means any entity that acts as a conduit in connection with the receipt and disbursement of any part of a Distribution in the process by which that Distribution moves from the Issuer to a Beneficial Owner or Customer. The principal Intermediaries are Paying Agents, the Depository Trust Company, DTC Participants and other brokerage firms.

"Issuer" means the entity initially issuing the shares of stock, bonds, debentures or other securities instruments.

"Nominee" means an entity, usually a general partnership, that is named for purposes of convenience as the Record Owner

of securities owned by or for the account of Intermediaries or Beneficial Owners.

"Paying Agent" means an entity, usually a bank, that is responsible for receiving Distributions from the Issuer and disbursing the Distributions on behalf of the Issuer. A Paying Agent may also maintain the stock or bond registration books as Registrar. The Paying Agent is the first Intermediary in the Physical Certificate System. It makes payments to Record Owners as reflected on the Issuer's books and records. In modern practice the majority of outstanding securities are held of record, as shown on the Issuer's books and records, in the name of Cede & Co. Most of the remaining Record Owners are large institutional investors such as insurance companies, mutual funds and brokerage firms trading in the names of their Nominees.

"Physical Certificate" means an instrument prepared by the Issuer of a security that reflects the named ownership of the security as shown on the records of the Issuer, along with the amount, type, interest rate, maturity date, if any, and all other such relevant terms.

"Physical Certificate System" means the process of issuing Physical Certificates by the Issuer in the name of each individual or entity whose name appears on the Issuer's books and records as the Record Owner. In modern practice, as brokerage firms come into possession of Physical Certificates, these Physical Certificates are reregistered in either the name of Cede & Co. or a Nominee name.

"Record Date" for a Distribution is the date established by the Issuer to determine the identity of the Record Owner to whom the Distribution is to be made.

"Record Owner" means the person in whose name the ownership of a security is recorded on the books of the Issuer. In modern securities practice the Record Owner is almost always either an Intermediary (usually Cede & Co.), a Nominee used by an institutional investor.

V. BACKGROUND.

12. Radical changes have occurred in the last twenty years with respect to the manner in which securities are traded and held, and Distributions are paid. A brief description of the evolution of the Distribution System is necessary to provide the background of this litigation and to facilitate a full understanding of the complex issues it involves.

13. Prior to 1970, securities transactions in shares of stock were effected through the actual transfer of

Physical Certificates. In securities exchanges and over-the-counter transactions, the brokerage firm representing the Customer who was selling securities delivered Physical Certificates to the brokerage firm representing the Customer who was buying securities. The purchasing Customer would then normally receive a Physical Certificate in his name. That Customer then became the Record Owner of the securities, and Distributions were thereafter made by the Issuer's Paying Agent by check mailed directly to the Customer. If the Customer was involved in active securities speculation, he might request that the Physical Certificates remain in the street name of his brokerage firm. He would then rely on his brokerage firm to produce the physical Certificate when necessary to complete a subsequent resale of the securities.

14. The use of Physical Certificates carried with it a considerable degree of risk. All Physical Certificates are negotiable instruments, and are vulnerable to theft and forgery. Physical Certificates are also subject to being lost or misplaced, or destroyed in connection with some type of casualty loss. Those Customers who chose not to hold their own Physical Certificates ran the additional risk that the brokerage firm might be unable to account for the Physical Certificates, or, worse yet, the brokerage firm might become insolvent and the Customers would become unsecured creditors.

15. The handling of Physical Certificates during this period was a major and troublesome aspect of the securities business. Issuers employed Paying Agents or stock transfer agents whose primary functions were to reregister Physical

Certificates, cancel old Physical Certificates, and issue new Physical Certificates. The volume of transactions processed through the brokerage firms and these transfer agents was tremendous.

16. Prior to 1983 securities transactions in bonds, debentures and other long term instruments of indebtedness were also handled through Physical Certificates. However, these Physical Certificates involved an even greater risk because they were often made payable to bearer. Anyone who possessed the debt instrument was, upon presentation, entitled to payment. Interest was traditionally payable only through a process of physically clipping coupons off the bearer bonds and delivering them to the Issuer's Paying Agent. Before the 1983 changes in the federal tax law, some Issuers did issue registered bonds or debentures to named owners, which

instruments could then be transferred by endorsement, much like stock, but the greatest majority were issued in bearer form. Today all municipal bonds are issued in registered form, and interest is paid by check mailed to the Record Owner by the Issuer's Paying Agent.

17. During the late 1960s and early 1970s, the traditional manner of handling securities transactions described above began to break down under the sheer weight of the increased volume of transactions. The "back offices" of brokerage firms became inundated with paper, and the tracing of transactions became increasingly difficult. The entire securities industry was confronted with a paperwork and record-keeping crisis inevitable in a system in which trillions of Physical Certificates were physically moved each year.

18. The present Distribution System for handling securities transactions evolved because of two major changes in the method by which these transactions were processed. Enactment by Congress of the Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa.-78lll. (1981), permitted Customers to accept bookkeeping entries without regard to the location of their Physical Certificates without risking the loss of capital in the event of brokerage firm failure. Secondly, the Depository Trust Company was created to serve as a nationwide clearinghouse. Brokerage firms who became DTC Participants could now deal with each other through Book Entry Accounting on the records of DTC, without the delivery of any Physical Certificates, by simply endorsing and reregistering all Physical Certificates in the name of Cede & Co. thereby making Cede

& Co. the only Record Owner, and depositing all these Physical Certificates at DTC. The Distribution System has now evolved even further. An Issuer may choose to issue securities in the Book Entry Certificate System so that a single Physical Certificate is issued in the name of Cede & Co. on behalf of DTC. Thereafter, all trades occur in book entry form. In the Book Entry Certificate System, no entity other than DTC has the authority to receive Physical Certificates.

19. The shift to Book Entry Accounting for recording the beneficial ownership of securities is now virtually complete. Less than one percent (1%) of all securities transactions involve the actual delivery of Physical Certificates. Most Physical Certificates outstanding today are held in street name, with Cede & Co. being the predominant holder. In well

over fifty percent (50%) of new issues, no Physical Certificates are available to Customers at all because the Issuer used the Book Entry Certificate System.

VI. CLAIMS OF DELAWARE AND NEW YORK.

20. Delaware and New York each argue that their respective claims to the Excess Receipts are supported by the rulings of this Court in Texas v. New Jersey, 379 U.S. 674, and Pennsylvania v. New York, 407 U.S. 206 (1972). These cases establish the principle that unclaimed property is subject to being remitted to the state of the last known address of its owner. If that address is unknown, the property is to be remitted to the state of incorporation of the debtor.

21. Delaware asserts the right to claim the Excess Receipts at issue herein on the basis that the identity of said

property's Beneficial Owner, whom Delaware equates with a creditor, is unknown. Therefore, the Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firm holding such funds, which is characterized by Delaware as the debtor.

22. New York, on the other hand, argues that the property's Beneficial Owner is always paid the Distributions to which he is entitled. The Beneficial Owner therefore has no claim to the Excess Receipts and his identity is irrelevant to the analysis of rights at issue herein. Instead, contends New York, the last known address of the brokerage firms that were underpaid, characterized by New York as the "creditor" firms, determines to which state the overpayments held by the "debtor" firms should be paid. Since most such brokerage firms have New York trading addresses,

New York is entitled to claim the Excess Receipts.

23. The arguments of both Delaware and New York are based upon narrow technical and legalistic analyses of a complex Distribution System, which is more fully described in Part VIII below. Both Delaware's designation of the brokerage firms as "debtors," and New York's classification of the "underpaid" brokerage firms as "creditors," fail to properly characterize the relationships of the various parties to ownership and Distribution transactions of the present Distribution System. In this Distribution System, at least two Intermediaries are always involved in the routine processing of ownership trades and moving Distributions between the Issuer and the ultimate Beneficial Owner/Customer. Delaware is basically contending that the

state of incorporation of the last Intermediary, the brokerage firm holding the Excess Receipts, determines the state to which all the unclaimed property is to be remitted. New York contends that all Excess Receipts should be remitted to New York for the reason that the principal business offices and headquarters of most of the Intermediary brokerage firms are located in the New York City area. Under either argument, the place of incorporation of mere Intermediaries, who act simply as transfer agents and who themselves as a rule make no claim to the Distributions,[3] will determine which state can claim and

---

[3]Delaware notes that one brokerage firm, Paine, Webber, Inc. may claim entitlement to Excess Receipts. Under the theory set forth, any brokerage firm desirous of asserting such claim who has traced the transaction sufficiently to identify entitlement to the funds could submit its claim to the Issuer's state of incorporation for payment.

take possession of hundreds of millions of dollars. As a practical matter under either states' theory, only two states would be legally authorized to claim the great bulk of these moneys.

VII. CLAIM OF WISCONSIN.

24. In both Texas v. New Jersey, 379 U.S. 674, and Pennsylvania v. New York, 407 U.S. 206, the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both equitable and easy to administer. In Texas v. New Jersey, 379 U.S. at 681, Mr. Justice Black adopted a rule that "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided" and that "will tend to distribute escheats among the States in the proportion of the commercial activities of their residents." The rule was clear under these legal

principles that when a Paying Agent could not find a last known address for the Record Owner, unclaimed dividends should be remitted to the state of incorporation of the Issuer. The same principle should be adopted in this litigation since the addition of mere Intermediaries to the chain of distribution should not affect the entitlement of states to the Excess Receipts. This would also return these moneys to the states pro rata according to each state's commercial activity, and would mitigate the harshness of the "winner take all" positions espoused by both Delaware and New York. This is the resolution urged by Plaintiff in Intervention.

VIII. DESCRIPTION OF THE DISTRIBUTION SYSTEM: PHYSICAL CERTIFICATES.

25. Whenever securities are to be issued, the Issuer must first choose whether to use the Physical Certificates

System or the Book Entry Certificate System. This part of the Complaint assumes that the Issuer selects the Physical Certificate System and opts to issue Physical Certificates in registered form, e.g., stock, if it is an equity transaction, or bonds/debentures if it is a debt transaction.

26. The Physical Certificates are purchased at closing by initial underwriters, who are DTC Participants. The DTC Participants then immediately reregister the Physical Certificates in the name of the Nominee of DTC, Cede & Co. The Physical Certificates are deposited at DTC, where they are effectively "parked" until after maturity or abandonment. All trades of Physical Certificates between or among DTC Participants occur only on the books and records of DTC.

27. By means of the foregoing, Cede & Co. becomes the Record Owner of all Physical Certificates deposited with DTC, although neither DTC nor Cede & Co. claims or has any legal ownership rights to, or interest in, the Physical Certificates except as custodian. Indeed, DTC characterizes itself as merely a collections and clearing agent.

28. Purchases of securities in the form of Physical Certificates held at DTC are made through brokerage firms who are, or act through, DTC Participants. These purchases are made in book entry form only. Customers do not receive from the Issuer or from their DTC Participant Physical Certificates evidencing their ownership interest in the securities. Rather, each Customer maintains an account at a DTC Participant or other brokerage firm. The books and records of the DTC Participant or

other brokerage firm constitutes the only evidence of each Customer's legal ownership of an undivided interest in the Physical Certificates held at DTC. When such "beneficial ownership" is purchased, the DTC Participant or other brokerage firm sends its Customer a transaction statement confirming and setting forth the terms of the purchase. In fact, DTC was created to eliminate the need to send Physical Certificates back to the Issuer's Paying Agent for reregistration in the name of the new owner or his brokerage firm each time a sale or transfer of such Physical Certificates occurred between the brokerage firms. Transactions at DTC are accomplished by the creation of what are, in effect, fungible Physical Certificates, whose only indices of ownership are evidenced on the books and records of DTC and DTC Participants.

29. The Customer who wants a Physical Certificate must make a request through a DTC Participant to have the Physical Certificate reregistered in her name. The DTC Participant then instructs DTC to endorse the appropriate amount of Physical Certificates purchased by its Customer and deliver those Physical Certificates to the Issuer's Paying Agent for reregistration. The reregistration process takes six to eight weeks.

30. Three (3) sets of books and records reflect the interests of the respective parties in Physical Certificates. The books and records of the Issuer (or its Paying Agent) reflect that Physical Certificates are held by Cede & Co. The books and records of DTC evidence the amount and identity of Physical Certificates held by each DTC Participant. The books and records of each DTC

Participant evidence the beneficial ownership of its respective Customers. Thus, there are at least three (3) sets of Record Owners evidenced on three (3) separate sets of books and records in the Distribution System.

31. Since Physical Certificates are registered in the name of Cede & Co., Distributions are paid by or at the direction of the Issuer directly to Cede & Co. Each Distribution received by DTC is allocated among DTC Participants in accordance with the ownership records of DTC on Ex Date. Payment of the Distribution to DTC Participants is the responsibility of DTC. Payment of the Distribution to the Customers or Beneficial Owners is the responsibility of DTC Participants. Immediately after DTC wires payment to the accounts of DTC Participants at their New York headquarters, DTC

Participants wire funds to each of their brokerage firms' branch offices in every state around the country. The local Customers are then paid the amount of the Distribution to which they are entitled according to their beneficial ownership interests.

32. As there are at least three (3) sets of books and records evidencing record ownership, there are also at least three (3) sets of books and records for every Distribution -- those maintained by the Issuer, by DTC and by each DTC Participant and their branch offices.

33. After it receives payment from DTC and credits its Customer accounts, each brokerage firm compares the Distribution it has paid out to its Customers, the Beneficial Owners, with the Distribution it has received from DTC. If all records are accurate, and nothing has changed since the

Ex Date, the amounts of the Distributions match. If, however, there have been transfers of beneficial ownership which have not been promptly recorded or which have occurred on or around the Ex Date, or if mistakes have been made in the recording or clearing of transactions by DTC or DTC Participants, some brokerage firms may receive an excess payment. It is this type of excess payment, referred to as Excess Receipts by Plaintiff in Intervention, that is presently in issue in this lawsuit.

34. The following example illustrates the foregoing:

On January 1, Customer X (Beneficial Owner) purchases 100 shares of the stock of Wisconsin, Inc., through Broker A, a DTC Participant. Broker A purchases the stock from Broker B, also a DTC Participant, Broker A credits the account of Customer X, also on January 1.

Wisconsin, Inc. declared a dividend of $5 per share with Ex Date of January 2. Broker A credits the account of Customer X $500 for the dividend payment. However, the transfer of interest in the stock from Broker B to Broker A has not been recorded, so Broker B is credited by DTC with $500 in dividends.

Broker A has been underpaid, but Broker A goes ahead and pays its Customer. Broker B has been overpaid, or has received Excess Receipts.

35. Most DTC Participants who are underpaid decline to trace individual securities transactions through the Distribution System to identify the DTC Participant that received the Excess Receipts, and fail to utilize the DTC claims procedure to recover the amount of said Excess Receipts. It is best expressed as "it all comes out in the wash" attitude

because of the huge volume and the frequency of occurrence. If accounts are to be settled among DTC Participants, such must be done, pursuant to DTC rule, through Cede & Co. and within a short period of time. Moreover, in some cases tracing may not be possible at all because of inadequate or incomplete records. The huge volume of transactions has created such a gnarled system, involving billions of entries on a paper trail, that tracing is generally neither cost-effective nor feasible. In 1987 DTC Participants delivered 9.8 trillion dollars of securities through Book Entry Accounting.

DESCRIPTION OF DISTRIBUTION SYSTEM:
BOOK ENTRY CERTIFICATE SYSTEM

36. This part of the Complaint assumes that the Issuer has chosen to issue securities in Book Entry Certificate form. Book Entry Certificates were created to

relieve the tremendous paper burden created by Physical Certificates. Under this method of issuing stocks and bonds, the Issuer issues one Physical Certificate (or one Physical Certificate for each maturity and each interest rate), in the name of Cede & Co. as the Record Owner. At closing, the underwriting DTC Participants instruct Cede & Co. to credit their respective accounts with their appropriate portion of Book Entry Certificates in exchange for cash paid directly to the Issuer. Thereafter, all subsequent trades are conducted solely by computerized credits and debits to DTC Participant accounts, and computerized credits and debits by DTC Participants of the accounts of their Customers, the Beneficial Owners. The Customers are told from the beginning that they are not entitled to receive, nor will they ever receive, Physical

Certificates, and that all notices of redemption, tender offers, mergers, stock dividends and-cash dividends will be sent only to Cede & Co. DTC Participants are advised by Cede & Co. of such events, and DTC Participants are responsible for providing their Customers as Beneficial Owners with this notice.

37. With respect to Distributions in the Book Entry Certificate System, the Issuer makes all payments directly to Cede & Co. by wire transfer of funds to Cede & Co.'s account at the New York Federal Reserve Bank. Thereafter, the respective interests of DTC Participants are paid as reflected on the books and records of DTC. The beneficial ownership interest of each of the Participants' Customers are paid according to the books and records of the DTC Participants and their branch offices. Thus, as is the case with Physical

Certificates, at least three (3) distinct sets of books and records are maintained in connection with Book Entry Certificates, those of the Issuer, of DTC, and of the DTC Participants and their branch offices. Each reflects a different Record Owner.

38. The foregoing describes how most of the Excess Receipts or unclaimed property that is the subject of this lawsuit came into existence. Generally, such Excess Receipts consist of money. However, such property can and does also include Physical Certificates registered to Cede & Co. that are held at DTC.

IX. PLAINTIFF IN INTERVENTION'S ANALYSIS OF RIGHTS AND RELATIONSHIPS.

39. As previously stated, DTC and DTC Participants are Intermediaries functioning as agents of both the Issuer and the Beneficial Owner. Neither DTC nor DTC

Participants have claimed any legal ownership interest to the Excess Receipts at issue herein. The brokerage firms cannot reasonably or legally be characterized as either creditors or debtors. Moreover, it makes no sense to analyze rights on the basis of who is the "Record Owner" of the securities or of the Distributions, since the identity of the "Record Owner" varies depending on whose records are being examined.

40. The declaration of a dividend or principal and interest payments basically represents a debt between the Issuer and the Beneficial Owner. The Beneficial Owner is in fact the creditor and the Issuer the debtor. It makes no difference for purposes of legal analysis in this case that the Beneficial Owner may have been paid the Distribution, because all of these Excess Receipts are simple accounting

errors occurring on at least three (3) different sets of books and records. All Excess Receipts arise in the context of the chain of transactions between the debtor-Issuer and creditor-Beneficial Owner, and if the existence and location of the Beneficial Owner is unknown, the Excess Receipts, pursuant to Texas v. New Jersey, 379 U.S. 674, should be remitted to the state of incorporation of the Issuer.

X. SPECIFIC PROPERTY CLAIMED BY PLAINTIFF IN INTERVENTION.

41. In its complaint, Delaware identifies fifteen DTC Participants incorporated in Delaware from which New York has either wrongfully taken or demanded the Excess Receipts at issue herein. One such brokerage firm identified is Dean Witter Reynolds, Inc. According to the actual Report of Abandoned Property filed by Dean Witter Reynolds, Inc. ("Dean

Witter Report") with the New York Comptroller, Dean Witter Reynolds, Inc. turned over $354,737.02 to New York in 1982, along with 319 individual stock certificates, which amount represented abandoned property held by said firm at the close of business December 31, 1981. Of that amount, at least $1,478 represented moneys that were attributable to Issuers incorporated in the State of Texas. Texas in its Complaint in Intervention claimed the right to take possession of such moneys. In addition Texas claimed the right to any other Excess Receipts generated by Texas Issuers held or formerly held by the brokerage firms incorporated in the State of Delaware and remitted to or demanded by New York for the period 1978 through 1985. Wisconsin now makes identical claims for moneys attributable to

Issuers incorporated in the State of Wisconsin.

42. While the amount turned over by Dean Witter Reynolds, Inc. and claimed by Texas may seem small, it represents but one year of these Excess Receipts reported by a single brokerage firm. The amount of unclaimed property presently in issue in this litigation that Texas and Wisconsin are entitled to claim is presently unknown, but is very substantial.

XI. ADDITIONAL EXCESS RECEIPTS.

43. In addition to claiming a portion of the Excess Receipts held or formerly held by the brokerage firms and demanded by or remitted to New York, Plaintiff in Intervention asserts a claim to certain Additional Excess Receipts demanded by or remitted to the State of New York which is not at issue between Delaware and New York,

but which should be considered by the Court. As will be described more fully in Parts XII and XIII, infra, the property consists of those Additional Excess Receipts held by DTC or its Nominee, Cede & Co. It also consists of Additional Excess Receipts which have arisen in connection with Distributions made by Governmental Issuers, which property is only now being demanded by New York pursuant to a recent statutory amendment.

44. The amount of such Additional Excess Receipts greatly exceeds the amount of Excess Receipts presently in controversy. If this proceeding remains limited in scope to the Excess Receipts already in issue, it will be the proverbial case of the "tail wagging the dog."

XII. ADDITIONAL EXCESS RECEIPTS HELD BY DTC.

45. DTC[4] holds huge amounts of Additional Excess Receipts. These Additional Excess Receipts come into existence and acquire their character as unclaimed property in the same basic manner as the Excess Receipts held by DTC Participants.

46. DTC describes these Additional Excess Receipts as "Cede Float," which includes "payments on securities no longer on deposit" with DTC. The "Cede Float" occurs "after DTC transfers a securities certificate by endorsement, the transfer from DTC's nominee Cede & Co. is not reregistered on the books of the Issuer until a later time. Prior to

---

[4]Wisconsin is informed that a copy of the 1987 Annual Report of the Depository Trust Corporation has previously been filed with the Court.

reregistration, DTC may receive payments to Cede & Co. from the Issuer." Texas Complaint in Intervention, Exhibit "3" at 1.

47. Any balance remaining in connection with a Distribution after all DTC Participants' have been paid is "assumed to be applicable to the float and is recorded in the 'Unclaimed Dividends Account.'" Again, by DTC's own admission, the Additional Excess Receipts in the "Unclaimed Dividends Account" do not belong to DTC, but are merely held by DTC for the accounts of DTC Participants for the accounts of their Customers, the Beneficial Owners. Additional Excess Receipts remaining in the "Unclaimed Dividends Account" after three years are considered abandoned and are remitted by DTC to New York. Texas Complaint in Intervention, Exhibit "3" at 2.

48. Plaintiff in Intervention claims the Additional Excess Receipts and all Additional Excess Receipts held by DTC for the period 1978 through 1985 attributable to Issuers incorporated in the State of Wisconsin. This claim is made for the same reason and on the same basis that Wisconsin claims a portion of the funds already at issue in this litigation.

50. When Book Entry Certificates are issued, DTC is in direct contractual relationship with the Issuer and functions as the Issuer's Paying Agent and registrar. Thus, without regard to other claims, DTC is responsible as a Paying Agent under Texas v. New Jersey, 379 U.S. 674. Paying Agents presently remit owner unknown Distributions to the state of incorporation.

XIII. ADDITIONAL EXCESS RECEIPTS ATTRIBUTABLE TO GOVERNMENT ISSUES.

51. The second type of Additional Excess Receipts results from bonds or debentures issued by Governmental or corporate Issuers. When the Issuer is a governmental entity, Distributions always arise in connection with municipal bonds issued to finance local governmental projects, and consist of principal and interest payments. They have never been reported or remitted to any state. They are now being demanded by New York. Pursuant to amendments to Section 300 of New York's Abandoned Property Law,[5] which became effective April 21, 1987, Distributions attributable to Governmental Issuers held on or after July 1, 1984, are now being demanded by New York if they have

---

[5]New York Abandoned Property Law § 300 (McKinney Supp. 1988).

not been claimed at the expiration of three years.

52. DTC and DTC participants have never reported or remitted to any state these Additional Excess Receipts; instead, they have been lying fallow at DTC and at each and every DTC Participant. Until now, there has been no vehicle by which any state could claim and take possession of these Additional Excess Receipts paid into the Distribution System by each of the states' cities, counties and school districts.

53. Plaintiff in Intervention claims the right to take possession of Additional Excess Receipts held by DTC and all DTC Participants attributable to Wisconsin Governmental Issuers for the period 1978 to 1985, the same period covered by this suit. With respect to the Additional Excess Receipts held by the DTC Participants,

Plaintiff in Intervention claims that property for the same reason and on the same basis that it claims a portion of the funds already at issue in this litigation.

54. While the amount of its claim to Additional Excess Receipts held by DTC and any DTC Participants attributable to Wisconsin Governmental Issuers is presently unknown, Plaintiff in Intervention estimates that amount will be substantial.

XIV. PROPRIETY OF CONSIDERING ADDITIONAL EXCESS RECEIPTS.

55. Plaintiff in Intervention urges the Court to consider and determine the rights to claim the potentially huge amounts of Additional Excess Receipts. The decision of this Court with respect to the Excess Receipts already before it will conclusively and finally determine the rights of all states to take custodial possession of such Additional Excess

Receipts. Such a final determination of rights should not be made without the Court's having first considered arguments which are relevant and peculiar to the Additional Excess Receipts. Inclusion of the Additional Excess Receipts will not broaden the issues or unduly complicate the pending litigation.

56. The Additional Excess Receipts were not initially made part of this litigation because neither Delaware nor New York had any incentive to include them. DTC is incorporated in the State of New York. All Additional Excess Receipts held by DTC would therefore be remitted to New York and all Excess Receipts held by DTC Participants would go to Delaware, under the theory urged in this litigation by Delaware. Under New York's theory of this litigation, New York would take all Additional Excess Receipts and Excess

Receipts from both DTC and DTC Participants. By amending its statute, New York has also poised itself to seize all Additional Excess Receipts existing in the form of municipal bond Distributions.

XV. MERITS OF CLAIM ASSERTED AND RESOLUTION URGED BY PLAINTIFF IN INTERVENTION.

57. In Texas v. New Jersey, 379 U.S. 674, and Pennsylvania v. New York, 407 U.S. 206, the Court made clear its commitment to resolving unclaimed property controversies in a manner that is both easy to administer and equitable. The resolution urged by Plaintiff in Intervention satisfies both criteria. It is easy to administer, since the identity of the Issuer is always easily determined. Indeed, the identity of the Issuer is consistently known and reflected on all sets of books and records of all parties to the securities transactions.

Moreover, all DTC Participants have regional or branch offices located in every state. These branch offices already maintain a separate set of books and records for local Customers evidencing their local Customers' ownership interests and Distribution receipts. Each branch/regional office also maintains its own bank account, and is individually accountable for year-end profit and loss statements to its New York headquarters. Presently, each branch office also maintains its own "Suspense Accounts" for unclaimed Distributions. These unclaimed funds are returned to their New York headquarters and are then remitted by the DTC Participant to New York. Thus transaction records already exist on a state-by-state basis.

58. The resolution proposed by Plaintiff in Intervention is also by far

the most equitable method of distributing the unclaimed property at issue in this lawsuit. This is particularly true with respect to the Additional Excess Receipts consisting of municipal bond Distributions. It is outrageous that moneys held by DTC Participants attributable to the State of Wisconsin and its political subdivisions might be remitted to New York, or any state, other than the State of Wisconsin. It is also particularly egregious that the Additional Excess Receipts held by DTC, which clearly functions merely as a Paying Agent or registrar in these transactions, are being demanded by and will be, without this Court's intervention, remitted to New York.

59. Excess Receipts can legitimately be characterized as nothing more than "distribution slop," created by poor accounting practices and record keeping

error and attributable in part to the inadequate training given to people responsible for the accounting and the maintenance of books and records. Excess Receipts truly constitute unclaimed property for which no Beneficial Owner or other person with any legal entitlement thereto is ever likely to appear. To determine the rights of various states to claim such Excess Receipts on the basis of the arguments urged by either Delaware or New York will, in essence, elevate form over substance. The respective resolutions sought by both Plaintiff and Defendant are not compelled by, or consistent with, a strict interpretation of legal precedent. Most importantly, however, both such resolutions are simply unfair.

WHEREFORE, Plaintiff in Intervention prays:

1. That Plaintiff in Intervention be allowed to intervene herein;

2. That Additional Excess Receipts held by the Depository Trust Company and demanded by or remitted to New York for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

3. That Additional Excess Receipts attributable to Governmental Issuers held by the Depository Trust Company and all DTC Participants for the period 1978 through 1985 be included as part of the unclaimed property in controversy in this lawsuit;

4. That the temporary injunction sought by Delaware with respect to the Excess Receipts already at issue herein be extended, for the reasons stated in the Complaint of Delaware, to restrain New York

from demanding or taking possession of all Excess Receipts attributable to Issuers incorporated in the State of Wisconsin or to Wisconsin Governmental Issuers;

5. That Defendant New York be restrained and enjoined from collecting any Excess Receipts and Additional Excess Receipts attributable to Issuers incorporated in the State of Wisconsin or attributable to Wisconsin Governmental Issuers, and from expending any sums collected but presently unspent, consisting of such Excess Receipts and Additional Excess Receipts, until such time as this controversy is resolved;

6. That judgment be entered that the Excess Receipts and Additional Excess Receipts held by DTC and DTC Participants attributable to Issuers incorporated in the State of Wisconsin or to Wisconsin Governmental Issuers is subject only to the

claims of the State of Wisconsin under ch. 177, Wis. Stats.; and

7. That New York be directed to pay or deliver to Plaintiff in Intervention all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Wisconsin and Wisconsin Governmental Issuers which have been abandoned for the applicable dormancy period under ch. 177, Wis. Stats.;

8. That Plaintiff in Intervention be granted such other and further relief as this Court deems just.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General of
Wisconsin

DANIEL D. STIER
Assistant Attorney
General
Counsel of Record

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3067

May, 1989

PROOF OF SERVICE

I, Daniel D. Stier, certify that I am counsel of record for Plaintiff in Intervention, the State of Wisconsin, that I am a member of the Bar of the Supreme Court of the United States, and that on the 5th day of May, 1989, I served three copies of Wisconsin's Motion for Leave to Intervene and Complaint in Intervention on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

Christopher Keith Hall
Counsel of Record
Assistant Attorney General
120 Broadway
New York, New York 10271

The Honorable Michael N. Castle
Governor
State of Delaware
820 North French Street, 12th Floor
Wilmington, Delaware 19801

The Honorable Charles M. Oberley, III
Attorney General
State of Delaware
820 North French Street
Wilmington, Delaware 19801

Richard L. Sutton
Counsel of Record
Morris, Nichols, Arsht & Tunnell
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899

The Honorable William P. Clements, Jr.
Governor
State of Texas
Post Office Box 12428
State Capitol
Austin, Texas 78711

The Honorable Jim Mattox
Attorney General
State of Texas
Supreme Court Building
Post Office Box 12548, Capitol Station
Austin, Texas 78711

Mary Keller
First Assistant Attorney General
State of Texas
Supreme Court Building
Post Office Box 12548, Capitol Station
Austin, Texas 78711

DANIEL D. STIER

Supreme Court, U.S.
FILED
MAY 12
JOSEPH F. SPANIOL
CLERK

No. 111 Original

In The

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Intervenor,

DISTRICT OF COLUMBIA,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant

MOTION BY THE DISTRICT OF COLUMBIA TO INTERVENE; COMPLAINT IN INTERVENTION; AND MEMORANDUM IN SUPPORT

FREDERICK D. COOKE, JR.
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004
Telephone: (202) 727-6252

TABLE OF CONTENTS

	Page
MOTION TO INTERVENE	1
COMPLAINT IN INTERVENTION	3
MEMORANDUM IN SUPPORT OF MOTION	6
APPENDIX	10

TABLE OF AUTHORITIES

Cases

National Association for the Advancement of Colored People v. New York, 413 U.S. 345 (1973)	8
Maryland v. Louisiana, 451 U.S. 725 (1981)	7-8
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*

Statutes

Constitution, Article III, §2	3
R.S. D.C. §2, 20 Stat. 102, ch. 180, §1	4
District of Columbia Disposition of Unclaimed Property Act, D.C. Law 3-160, as amended, D.C. Code §42-201 *et seq.* (1986 repl.)	*passim*
District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, 87 Stat. 820, as amended	4
28 U.S.C. 1251	3

Other Authorities

F.R.Civ.P. 24(a)(2)	1, 7
F.R.Civ.P. 24(b)	1, 8
New York Stock Exchange, Fact Book 1988 (1988)	7
Supreme Court R. 9.2	1, 7

In The

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 111 ORIGINAL

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Intervenor,

DISTRICT OF COLUMBIA,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

MOTION BY THE DISTRICT OF COLUMBIA TO INTERVENE

The District of Columbia moves to intervene in this original action as a matter of right or in the exercise of the Court's discretion. Sup. Ct. R. 9.2; F.R.Civ.P. 24(a), (b). A complaint in intervention accompanies this motion, as does a memorandum in support of the motion.

District law, as well as principles of law enunciated in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), entitle the District to a portion of the unclaimed funds whose ownership is being disputed by the parties to the present action, Delaware, New York, and Texas. The District's Disposition of Unclaimed Property Act. D.C. Law 3-160, *as amended*, D.C. Code §42-201 *et seq.* (1986 repl.), provides that intangible property (includ-

ing undistributed dividends, interest, and other proceeds arising from securities transactions) which is unclaimed by the owner more than seven years after the owner became entitled to it is presumed to be abandoned and must be delivered to the District. See §§103, 109, 119, 120, D.C. Code §§42-203, -209, -219, -220.

Unless the District is allowed to intervene, the property to which it is entitled may be awarded to one of the current parties or statutes of limitations may be interposed as defenses to the District's claims to the property. The District can therefore not rely on the current parties to protect its interests in the disputed property. The District's participation (and that of the other states that have moved to intervene) will avoid multiple suits between governmental claimants to the disputed property.

The District's intervention should not delay these proceedings or prejudice the ability of the present parties to protect their interests. The litigation is still in its infancy. Other than the complaints and answers, only one set of interrogatories has been served and answered.

Respectfully submitted.

FREDERICK D. COOKE, JR.
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004

Telephone: (202) 727-6252

In The

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 111 ORIGINAL

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Intervenor,

DISTRICT OF COLUMBIA,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION BY THE DISTRICT OF COLUMBIA

---

1. JURISDICTION The original jurisdiction of this Court over the present parties rests on Article III, §2 of the Constitution, and 28 U.S.C. 1251.

2. THE PENDING ACTION.

a. On May 31, 1988, the Court granted the State of Delaware leave to bring this action against the State of New York to determine the rights of those states to unclaimed intangible property ("excess receipts"), consisting of dividends, interest, and other distributions arising out of security transactions, the ownership of which is unknown and which is held by securities brokers incorporated in Delaware, but which exceeds the amounts to which the brokers are entitled.

b. On December 12, 1988, the Court appointed a special master for the dispute.

c. On February 21, 1989, the Court granted the State of Texas's motion to file a complaint in intervention that broadened the property in dispute to include dividends, interest, and other distributions ("additional excess receipts"), held by Depository Trust Corporation or Cede & Co., which have not been claimed by brokerage- and bank-members of the Depository Trust Co.

d. Alabama, Arizona, Connecticut, Hawaii, Illinois, Idaho, Indiana, Kansas, Kentucky, Louisiana, Montana, Nevada, New Mexico, Oklahoma, Pennsylvania, South Dakota, Tennessee, Utah, and Washington, have moved to intervene. Their motions are pending. Some of their complaints would expand the scope of the litigation to include excess receipts held by all brokerage firms, wherever incorporated.

3. THE DISTRICT OF COLUMBIA. The District of Columbia is a government and body corporate for municipal purposes, R.S.D.C. §2, 20 Stat. 102, ch. 180, §1, *as amended*, D.C. Code §1-102 (1987 repl.), to which Congress has given a large measure of self-government. See District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, 87 Stat. 820, *as amended*.

4. CLAIM BY THE DISTRICT OF COLUMBIA. Under the District of Columbia's Disposition of Unclaimed Property Act, D.C. Law 3-160, 27 D.C.R. 5150, *as amended*, D.C. Code §42-201 *et seq.* (1986 repl.), and under principles of law enunciated in *Texas v. New Jersey*, 379 U.S. 674 (1964), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), the District of Columbia is entitled to claim an undetermined portion of excess receipts held by brokerage firms, wherever located, and of additional excess receipts for one or more of the following reasons:

a. the holders are incorporated in the District of Columbia;

b. the holders are domiciled in the District;

c. the issuers of the distributions creating the excess receipts and additional excess receipts are incorporated in the District of Columbia or are the District of Columbia or its governmental units;

d. the securities transactions giving rise to the creation of the excess receipts and additional excess receipts are attributable to commercial and financial activity within the District of Columbia and, on information and belief, it is possible to distribute those receipts in proportion to that activity.

5. WHEREFORE, the District of Columbia demands judgment

a. for that portion of the excess receipts and additional excess receipts to which the District of Columbia is entitled by its Disposition of Unclaimed Property Act and other applicable principles of law;

b. against the state of New York for excess receipts and additional excess receipts to which the District of Columbia has been entitled but which have previously been seized by the State of New York, plus interest at the prevailing rate; and

c. for such further relief as is just.

FREDERICK D. COOKE, JR.
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004

Telephone: (202) 727-6252

In The

Supreme Court of the United States

OCTOBER TERM, 1988

NO. 111 ORIGINAL

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Intervenor,

DISTRICT OF COLUMBIA,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

MEMORANDUM IN SUPPORT OF MOTION BY THE DISTRICT OF COLUMBIA TO INTERVENE

This original action concerns intangible property generated by dividends, interest and principal payments, and other securities transactions, whose ownership is unknown and perhaps impossible to trace as a practical matter because of the billions of annual securities transactions involved. New York, Delaware, and Texas assert rights to the property based on conflicting theories.[1]

---

[1] In *Texas v. New Jersey*, 379 U.S. 674, 678, 680-681 (1965), the Court held that disputes between the states over escheatable property should be "determined primarily on principles of fairness" and ease of administration. Distribution "in proportion to the commercial activities of their

[Footnote continued on next page]

Under its Disposition of Unclaimed Property Act, D.C. Law 3-160, *as amended*, D.C. Code §42-201 *et seq.* (1986 repl.), patterned on the Uniform Unclaimed Property Act, the District of Columbia is entitled to undetermined portions of the unclaimed property under the theory espoused by Texas. In addition, under the theory espoused by Delaware, the District is entitled to the excess receipts held by brokerage houses incorporated in the District if the litigation is expanded to include intangible property held by brokerage houses incorporated outside Delaware. As the brief in support of the motion to intervene filed by Alabama and others points out, it would be an inefficient use of judicial resources to omit so many holders of excess receipts from litigation designed to adopt a single standard of entitlement.

The District of Columbia has a right to intervene in this action under F.R.Civ. P. 24(a)(2), as incorporated by Sup. Ct. R. 9.2, because the disposition of this action is likely, as a practical matter, to impair the District's ability to protect its interest in the disputed property. The Court has previously allowed governmental bodies with an interest in property subject to conflicting claims to intervene. In the present case, Texas was allowed to intervene; in *Pennsylvania v. New York*, 407 U.S. 206 (1972), Arizona, California, Connecticut, and Indiana, were allowed to intervene; in *Texas v. New Jersey*, 379 U.S. 674 (1965), Florida was allowed to intervene; see also *Maryland v. Louisiana*, 451 U.S. 725, 745-46 n. 21

[Footnote continued from previous page]

residents," could accomplish both purposes. *Id.* at 681; see also *Pennsylvania v. New York*, 407 U.S. 206, 210 (1972). New York's brief in opposition to Delaware's motion for leave to file a complaint suggests that formulae could be used to approximate entitlement, considering the expense involved in recreating billions of transactions. The New York Stock Exchange appears to keep statistics of stock ownership, brokerage firms, and broker representatives by state. See New York Stock Exchange, FACT BOOK 1988, 61-62, 68 (1988). Discovery may reveal other sources of readily accessible and relevant current statistics.

(1981) (allowing intervention by a state, because its allegations of injury were identical to those of the original plaintiff states, and by private pipeline companies because they had "a direct stake in this controversy" and were likely to provide "a full exposition of the issues"). The District's interest is not adequately represented by the existing parties because this is not a class action; the parties cannot be expected to protect the interest of the District when it diverges from their own; and the District's absence from this litigation may bar it from recovery of intangible property as to which a statute of limitations applies.[2]

Alternatively, the District should be permitted to intervene under F.R. Civ. P. 24(b) because the District's claims raise the same issues of law and fact already raised by the existing parties. The Court must analyze the securities distribution system in order to resolve the claims of the parties already before the Court and those applying to intervene. The District's participation will obviate multiple similar suits and will therefore expedite resolution of the controversy.

The District's motion is timely in light of all the circumstances, but especially considering how little has happened in the litigation thus far. See *National Association for the Advancement of Colored People v. New York*, 413 U.S. 345, (1973). Other than the filing of answers by New York and Delaware, the only substantive action taken by the present parties thus far has been a response to one set of interrogatories. No status conference or hearing has been held by the master. And motions to intervene by twenty states are pending before the Court.

---

[2] The District believes, however, that a statute of limitations defense is likely to be unsuccessful. See *Texas v. New Jersey*, 379 U.S. 674, 682 (1965) (escheat by state of corporate domicile is subject to rights of other states arising after the escheat, as, for example, when the other states subsequently make provision for the escheat of such property in their own laws).

CONCLUSION

The District of Columbia's motion to intervene should be granted.

Respectfully submitted.

FREDERICK D. COOKE, JR.
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004

Telephone: (202) 727-6252

DISTRICT OF COLUMBIA DISPOSITION OF UNCLAIMED PROPERTY ACT, D.C. LAW 3-160, *AS AMENDED, D.C. CODE* § 42-201 *ET SEQ.* (1986 REPL.)

(relevant provisions)

§ 42-201. Findings; purpose.

The District of Columbia currently lacks statutory authority to act as custodian for substantial sums of abandoned personal property within its jurisdiction. This chapter is intended to mandate the report and delivery by holders and to authorize the receipt for safekeeping and fiscal growth by the District of Columbia of any and all personal property which is abandoned, without regard either to any maximum length of time for which such property was abandoned or to any statute limiting the right to sue to claim such property.

§ 42-202. Definitions

As used in this chapter, the term:

(1) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held by the holder.

(2) "Attorney General" means the chief legal officer of a state.

(3) "Banking organization" means any bank, trust company, savings bank, or a private banker or such other individual or organization defined by the laws of the United States or of the District of Columbia as a bank or banking organization.

(4) "Business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of 2 or more individuals, whether or not for profit, including a banking organization, financial organization, life insurance corporation, or utility.

(5) "District" means within the geographical boundaries of the District of Columbia.

(6) "Domicile" means, with respect to businesses: (A) The state of incorporation in the case of a corporation incorporated under the laws of a state; (B) the state of the principal place of business in the case of a person not incorporated under the laws of a state; or (C) the state of the principal place of business in the United States of America in the case of any other person. For purposes of this chapter, the term "state" includes the District of Columbia.

(7) "Employee benefit trust distribution" means any money, life insurance, endowment, or annuity policy or proceeds thereof, securities or other intangible property, and any tangible property that is distributable to a participant, former participant, or the beneficiary, estate, or heirs of a participant, former participant or beneficiary, from a trust or custodial fund established under a plan to provide health and welfare, pension, vacation, severance, retirement benefit, death benefit, stock purchase, profit sharing, employee savings, supplemental unemployment insurance benefits, or similar benefits.

(8) "Financial organization" means any savings and loan association, building and loan association, credit union, or investment company.

(9) "Good faith" means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.

(10) "Holder" means any person wherever organized or domiciled:

(A) In possession of property belonging to another;

(B) Who is a trustee in case of a trust; or

(C) Who is indebted to another on an obligation.

(11) "Intangible personal property" means all choses or things in action.

(12) "Last known address" means a description of the location of the apparent owner for the purpose of the delivery and receipt of mail.

(13) "Life insurance corporation" means any association or corporation including any nonprofit relief association as defined by § 47-2611, transacting the business of insurance on the lives of persons or insurance appertaining thereto, including, without limitation, endowments and annuities.

(14) "Mayor" means the Mayor of the District of Columbia or the Mayor's authorized agent.

(15) "Owner" means a depositor in the case of a deposit; a beneficiary in the case of a trust; a creditor, claimant, or payee in the case of other choses in action; or any person having a legal or equitable interest in property subject to this chapter or his or her legal representative.

(16) "Person" means an individual, business association, government or governmental subdivision or agency, public corporation, public authority, estate, trust, 2 or more persons having a joint or common interest, or any other legal or commercial entity.

(17) "Utility" means any person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

§ 42-203. Property presumed abandoned.

(a) All intangible personal property, not otherwise covered by this chapter, including any income or increment thereon and deducting any lawful charges, that is held or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than 7 years after it became payable or distributable is presumed abandoned.

(b) Property presumed abandoned shall include, but is not limited to: Drafts, credit balances, credit checks, uncashed vendor checks, and any other outstanding checks.

(c) Property subject to this chapter shall be deemed payable or distributable notwithstanding the owner's failure to present any instrument or document evidencing the owner's right to receive the payment provided therein.

§ 42-204. Conditions precedent to presumption of abandonment.

Unless otherwise provided by statute of the District of Columbia, intangible personal property is subject to a presumption of abandonment under this chapter if the conditions leading to a presumption of abandonment as described in §§ 42-203 and 42-205 through 42-216 are satisfied, and:

(1) The last known address of the apparent owner, as shown on the records of the holder, is in the District;

(2) An apparent owner cannot be established and at least 1 of the following apply:

(A) The last known address of the person entitled to the property is established as being within the District;

(B) The holder is domiciled in the District and has not previously paid or delivered the property to a state; or

(C) The holder is the District government and it has not previously paid or delivered the property to a state;

(3) The last known address of the apparent owner, as shown on the records of the holder, is in a state that does not provide an escheat or abandoned property law applicable to the property in question and the holder is:

(A) Domiciled in the District; or

(B) The District government;

(4) The last known address of the apparent owner, as shown on the records of the holder, is in a foreign nation and the holder is:

(A) Domiciled in the District; or

(B) The District government; or

(5) The transaction concerning the property took place in the District, and:

(A) (i) The owner of the property is unknown, or (ii) the last known address of the apparent owner as shown on the records of the holder is in a state that does not provide an escheat or abandoned property law applicable to the property; and

* * *

(B) The holder is domiciled in a state that does not provide an escheat or abandoned property law applicable to the property.

§ 42-209. Undistributed dividends and distributions of business associations.

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within 7 years after the date prescribed for payment or delivery, is presumed abandoned if:

(1) It is held or owing by a business association organized under the laws of or created in the District; or

(2) It is held or owing by a business association doing business in the District, but not organized under the laws of or created in the District, and the records of the business association indicate that the last known address of the person entitled thereto is in the District.

* * *

§ 42-217. Report of property presumed abandoned.

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this chapter shall report to the Mayor with respect to the property as provided in this section.

(b) The report must be verfied and shall include:

(1) In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and the beneficiary and his or her last known address according to the life insurance corporation's records;

(2) In the case of the contents of a safe deposit box or other safekeeping repository or in the case of other tangible

(3) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $50 shall be reported in the aggregate upon the aggregation exceeding $50;

(4) The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property;

(5) Other information which the Mayor prescribes by rule as necessary for the administration of this chapter; and

(6) Except with respect to traveler's checks and money orders, the name, if known, and last known address, if any and if known, of each person appearing from the records of the holder to be the owner of any property of the value of $50 or more presumed abandoned under this chapter.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or the present holder has changed his or her name while holding the property, the present holder shall file with his or her report all known names and addresses of each previous holder of the property.

(d) The report as of the prior June 30th must be filed before November 1st of each year, but the report as of the prior December 1st of life insurance corporations must be filed before May 1st of each year. The Mayor may postpone the reporting date upon written request by any person required to file a report. In calendar year 1981, the report concerning all property presumed to be abandoned as of June 30, 1980 (and December 1, 1980, for insurance companies), must be filed no later than June 20, 1981.

(e) If the holder of property presumed abandoned under this chapter has in its records an address of the apparent owner, the holder shall, not more than 120 days prior to filing the report required by this section, send written notice to the owner at the last known address to prevent abandonment from being presumed. Within [*sic*] respect to the property required to be reported by June 20, 1981, pursuant to

subsection (d) of this section, the holder shall send the written notice between March 15, 1981, and June 20, 1981 (to prevent abandonment from being presumed) to the owner at the last known address.

(f) Verification, if made by a partnership, must be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

§ 42-218. Notice of abandoned property.

(a) Within 120 days from the filing of the report required by § 42-217, the Mayor shall cause notice to be published at least once each week for 2 consecutive weeks in a newspaper of general circulation in the District.

(b) The published notice shall be entitled "Notice of Names of Persons Appearing To Be Owners of Abandoned Property" and shall contain:

(1) The names in alphabetical order and last known addresses, if any, of persons listed in the report and entitled to notice as specified in this chapter;

(2) A statement that information concerning the amount or description of the properpty and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the Mayor; and

(3) A statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction before April 1st, or in the case of life insurance companies October 1st, the abandoned property will be placed in the custody of the Mayor not later than May 1st, or in the case of life insurance corporations November 1st, and all further claims must thereafter be directed to the Mayor.

(c) The Mayor is not required to publish notice of any item of less than $50 in value unless the Mayor deems such publication to be in the public interest.

(d) Within 120 days from the receipt of the report required by § 42-217, the Mayor shall mail a notice to each person

having an address listed who appears to be entitled to property of a value of $50 or more presumed abandoned under this chapter.

(e) The mailed notice shall contain:

(1) A statement that, according to a report filed with the Mayor, property is being held to which the addressee appears entitled;

(2) The name and address of the person holding the property and any necessary information regarding the changes of name and address of the holder; and

(3) A statement that, if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the custody of the Mayor and all further claims must be directed to the Mayor.

(f) This section is not applicable to sums payable on traveler's checks or money orders and similar written instruments that are presumed abandoned under § 42-205.

(g) With respect to the property reported on or before June 20, 1981, pursuant to § 42-217 (d), the Mayor shall cause the newspaper notice required by subsection (a) of this section and the mailing notice required by subsection (d) of this section to be completed no later than July 15, 1981. The newspaper notice shall contain all the information required by paragraphs (1) and (2) of subsection (b) of this section and a statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction on or before August 30, 1981, all further claims must thereafter be directed to the Mayor.

§ 42-219. Payment or delivery of abandoned property.

(a) Except as otherwise provided in subsections (b) and (c) of this section, every person who has filed a report under § 42-217 shall, within 6 months after the final date for filing reports as required by § 42-217, pay or deliver to the Mayor all abandoned property specified in the report. With respect

to property reported by holders on or before June 20, 1981, pursuant to § 42-217 (d), the holders shall pay or deliver to the Mayor all abandoned property specified in the report no later than September 15, 1981.

(b) If the owner establishes the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property which will no longer be presumed abandoned to the Mayor, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(c) In the case of sums payable on traveler's checks, money orders, and similar written instruments presumed abandoned under § 42-205 or any other property reported pursuant to § 42-217 for which the holder has not reported the name of the apparent owner, the property shall be paid or delivered to the Mayor at the time of filing the report specified in § 42-217.

* * *

§ 42-226. Claim of state to recover property.

(a) At any time after property has been paid or delivered to the Mayor under this chapter, a state is entitled to recover the property if:

(1) The property was presumed abandoned in the District because the apparent owner was unknown when the property was presumed abandoned under this chapter, the last known address of the apparent owner was in fact in that state, and under the laws of that state, the property escheated to or was subject to a claim of abandonment by that state;

(2) The last known address of the apparent owner of the property appearing on the records of the holder is in that state and, under the laws of that state, the property has escheated to or become subject to a claim of abandonment by that state;

(3) The records of the holder were erroneous in that they did not accurately reflect the actual owner of the property and the last known address of the actual owner is in that state, and, under the laws of that state, the property has escheated to or become subject to a claim of abandonment by that state;

(4) The property was presumed abandoned to the District government under § 42-204 (5) and under the laws of the state of domicile of the holder the property has escheated to or become subject to a claim of abandonment by that state; or

(5) The property is the sum payable on a traveler's check, money order, or other similar instrument that was presumed abandoned to the District under § 42-205, the traveler's check, money order, or other similar instrument was in fact purchased in that state, and, under the laws of that state, the property has escheated to or become subject to a claim of abandonment by that state.

(b) The claim of a state to recover escheated or abandoned property under this section must be presented in a form prescribed by the Mayor, who shall consider the claim within 30 days after it is presented. The Mayor shall allow the claim if the Mayor determines that the claiming state is entitled to the abandoned property.

(c) In connection with all property so delivered to a state, the Mayor shall seek indemnification from the state making the claim.

* * *

§ 42-234. Reciprocal actions and agreements.

(a) At the request of a state, the Corporation Counsel may bring an action in the name of the administrator of the requesting state, in any court of appropriate jurisdiction to enforce the unclaimed property laws of the requesting state against a holder in the District of property subject to escheat or a claim of abandonment by that state, if that state has agreed to pay expenses incurred by the Corporation Counsel in bringing the action.

(b) The Mayor may request that the attorney general of a state or any other person bring an action in the name of the Mayor in that state. The District government shall pay all expenses including attorney's fees in any action under this subsection. Any expenses paid pursuant to this subsection may not be deducted from the amount that is subject to the claim by the owner in accordance with this chapter.

(c) (1) The Mayor may enter into an agreement to provide and to receive information needed to enable the District government and a state to audit or otherwise determine unclaimed property that the District or the state may be entitled to escheat or subject to a claim of custody as abandoned property.

(2) The Mayor may by rule require the reporting of information needed to enable the Mayor to comply with agreements made pursuant to this section and prescribe the form, including verification of the information to be reported, and the times for filing the reports.

(d) The Mayor may join with states to seek enforcement of this chapter against any person who is or may be holding property reportable under this chapter.

* * *

§ 42-241. Uniformity of application and construction.

This chapter shall be applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this chapter among those states enacting it.

No. 111 Original

FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATE OF TEXAS,

Intervenor Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

RESPONSE OF THE STATE OF DELAWARE TO THE APPLICATIONS FOR LEAVE TO INTERVENE FILED BY THE STATES OF ALABAMA, ARIZONA, CONNECTICUT, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, NEW MEXICO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

Charles M. Oberly, III
Attorney General of Delaware
Fred S. Silverman
Chief Deputy Attorney General
J. Patrick Hurley, Jr.
Assistant Attorney General
Richard L. Sutton, Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

May 18, 1989

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

4 pp

No. 111 Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATE OF TEXAS,

Intervenor Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

RESPONSE OF THE STATE OF DELAWARE TO THE APPLICATIONS FOR LEAVE TO INTERVENE FILED BY THE STATES OF ALABAMA, ARIZONA, CONNECTICUT, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, NEW MEXICO, OKLAHOMA, SOUTH DAKOTA, TENNESSEE, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

Applications for leave to intervene in this action have been filed by the States of Alabama, Arizona, Connecticut,

Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, New Mexico, Oklahoma, South Dakota, Tennessee, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (the "Intervenor States"). Such applications show that all of the Intervenor States rely on the same theory of recovery already put forward herein by The State of Texas ("Texas") and seek intervention simply to protect their respective interest in portions of the property involved in this case should Texas' position prevail.

Accordingly, it appears to the State of Delaware ("Delaware") that such intervention ought not to cause any complication to, or hindrance or delay in, the proceeding to resolve the presently competing claims herein of Delaware, New York and Texas. Intervention on such basis is not opposed by Delaware.

Charles M. Oberly, III
Attorney General of Delaware

Fred S. Silverman
Chief Deputy Attorney General

J. Patrick Hurley, Jr.
Assistant Attorney General

Richard L. Sutton,
Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

May 18, 1989

PROOF OF SERVICE

I, JAMES LAWLESS, IV, certify pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, that I represent plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 17th day of May, 1989, I served copies of the foregoing Response Of The State Of Delaware To The Applications For Leave To Intervene Filed By The States Of Alabama, Arizona, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, New Mexico, Oklahoma, South Dakota, Tennessee, Utah And Washington, And The Commonwealths Of Kentucky And Pennsylvania, on all parties required to be served by depositing such copies, first-class postage prepaid, in a United States Post Office, addressed in accordance with the service list attached hereto.

James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Counsel for Plaintiff,
the State of Delaware

(21)

Supreme Court, U.S.
FILED
MAY 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, Plaintiff

STATE OF TEXAS, Plaintiff in Intervention

V.

STATE OF NEW YORK, Defendant

* * *

REPLY OF THE STATE OF TEXAS TO THE MOTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION AND THE MOTIONS OF THE STATES OF ARIZONA, CONNECTICUT, IDAHO, NEW MEXICO, TENNESSEE, AND WISCONSIN FOR LEAVE TO INTERVENE

* * *

Of Counsel:

ANNE L. SCHWARTZ
General Counsel
Texas State Treasury Department
L.B.J. State Office Bldg.
Austin, Texas 78711

JIM MATTOX
Attorney General of Texas

MARY F. KELLER
First Assistant Attorney General
Counsel of Record

DAVID A. TALBOT
Special Assistant Attorney General
Chief, Finance Division

JIM THOMASSEN
Assistant Attorney General
Chief, Public Finance Section
Attorneys for Plaintiff in Intervention, State of Texas

NO. 111 Original

* * *

IN THE SUPREME COURT OF THE
UNITED STATES
October Term, 1988

* * *

STATE OF DELAWARE, *Plaintiff*

STATE OF TEXAS, *Plaintiff in Intervention*

V.

STATE OF NEW YORK, *Defendant*

* * *

REPLY OF THE STATE OF TEXAS TO THE MOTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION AND THE MOTIONS OF THE STATES OF ARIZONA, CONNECTICUT, IDAHO, NEW MEXICO, TENNESSEE, AND WISCONSIN FOR LEAVE TO INTERVENE

The State of Texas ("Texas") hereby files its reply to the motion of the states of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania for leave to file complaint in intervention and motions of

the states of Arizona, Connecticut, Idaho, New Mexico, Tennessee, and Wisconsin for leave to intervene. Each of the moving parties are sovereign states of the United States of America (collectively, the "States"). Texas alleges as follows:

1. Texas does not oppose the motions of the States or of any of them.

2. The claims made by the States involve questions of law and fact common to those already before the Court.

3. The intervention of the States will not unduly delay these proceedings or prejudice the rights of the present parties, in that fourteen of the States are represented by one counsel of record, and the other States have stated their willingness to have Texas act as lead counsel. Texas has indicated its willingness to so act as lead counsel for those States representing themselves.

Respectfully submitted,

JIM MATTOX
Attorney General of Texas

_____

MARY F. KELLER
First Assistant Attorney General
Counsel of Record

_____

DAVID A. TALBOT
Special Assistant Attorney General
Chief, Finance Division

JIM THOMASSEN
Assistant Attorney General
Chief, Public Finance Section

P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2018

Of Counsel:

ANNE L. SCHWARTZ
General Counsel
Texas State Treasury Department
L.B.J. State Office Building
Austin, Texas 78711
(512) 463-5971

Austin, Texas
May 17, 1989

PROOF OF SERVICE

I MARY F. KELLER, certify that I am counsel of record for Plaintiff in Intervention, the State of Texas, that I am a member of the Bar of the Supreme Court of the United States, and that on the _____ day of May, 1989, I served three copies of the foregoing REPLY OF THE STATE OF TEXAS TO THE MOTION OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION AND THE MOTIONS OF THE STATES OF ARIZONA, CONNECTICUT, IDAHO, NEW MEXICO, TENNESSEE, AND WISCONSIN FOR LEAVE TO INTERVENE on all parties required to be served by depositing such copies, first class, postage prepaid, in the United States mail, addressed as follows:

The Honorable Thomas H. Jackson
Special Master
School of Law
University of Virginia
Charlottesville, Virginia 22901
(804) 924-7343

The Honorable Mario M. Cuomo, Governor
State of New York
Executive Chamber
State Capitol
Albany, New York 12224
(518) 474-8390

The Honorable Robert Abrams, Attorney General
State of New York
120 Broadway, 25th Floor
New York, New York 10271
(212) 341-2519

The Honorable Christopher Keith Hall
Assistant Attorney General
Counsel of Record
State of New York
120 Broadway
New York, New York 10271
(212) 341-2519

The Honorable Michael N. Castle, Governor
State of Delaware
820 North French Street, 12th Floor
Wilmington, Delaware 19801
(302) 571-3210

The Honorable Charles M. Oberly, Attorney General
State of Delaware
820 North French Street, 8th Floor
Wilmington, Delaware 19801
(302) 571-3838

Richard L. Sutton, Attorney at Law
Counsel of Record
State of Delaware
Morris, Nichols, Arsht & Tunnell
1105 N. Market Street
P. O. Box 1347
Wilmington, Delaware 19899
(302) 658-5200

The Honorable Guy Hunt, Governor
State of Alabama
Executive Department
11 S. Union Street
Montgomery, Alabama 36130
(205) 261-7100

The Honorable Don Siegelman, Attorney General
State of Alabama
State House, 11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

The Honorable Rose Medford, Governor
State of Arizona
1700 W. Washington
West Wing, 9th Floor
Phoenix, Arizona 85007
(602) 255-4331

The Honorable Robert K. Corbin, Attorney General
State of Arizona
The Honorable Ian A. Macpherson, Assistant Attorney General and
Chief Counsel, Tax Division
Counsel of Record
State of Arizona
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

The Honorable William A. O'Neill, Governor
State of Connecticut
210 Capitol Avenue
Hartford, Connecticut 06106
(203) 566-4840

The Honorable Clarine Nardi Riddle
Acting Attorney General
State of Connecticut
The Honorable William J. Prensky, Assistant Attorney General
Counsel of Record
State of Connecticut
110 Sherman Street
Hartford, Connecticut 06105
(203) 566-4899

The Honorable John D. Waihee, III, Governor
State of Hawaii
State Capitol
Honolulu, Hawaii 96813
(808) 548-5420

The Honorable Warren Price, III, Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

The Honorable Cecil D. Andrus, Governor
State of Idaho
Statehouse
Boise, Idaho 83720
(208) 334-2100

The Honorable James T. Jones, Attorney General
State of Idaho
The Honorable Theodore V. Spangler, Jr., Deputy Attorney General
Counsel of Record
State of Idaho
P. O. Box 36
Boise, Idaho 83722
(208) 334-7530

The Honorable James R. Thompson, Governor
State of Illinois
207 State House
Springfield, Illinois 62706
(217) 782-6830

The Honorable Neil F. Hartigan, Attorney General
State of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

The Honorable Robert D. Orr, Governor
State of Indiana
State House
Indianapolis, Indiana 46204
(317) 232-4567

The Honorable Linley E. Pearson, Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

The Honorable Mike Hayden, Governor
State of Kansas
2nd Floor, State Capitol
Topeka, Kansas 66612
(913) 296-3232

The Honorable Robert T. Stephan, Attorney General
State of Kansas
301 West Tenth Street
Judicial Center--Second Floor
Topeka, Kansas 66612
(913) 296-2215

The Honorable Martha Layne Collins, Governor
Commonwealth of Kentucky
State Capitol, Room 102
Frankfort, Kentucky 40601
(502) 564-2611

The Honorable Frederic J. Cowan, Attorney General
Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

The Honorable Edwin W. Edwards, Governor
State of Louisiana
P. O. Box 94004
Baton Rouge, Louisiana 70804
(504) 342-7015

The Honorable William J. Guste, Jr., Attorney General
State of Louisiana
22nd Floor
State Capitol
Baton Rouge, Louisiana 70804
(504) 342-7013

The Honorable Ted Schwinden, Governor
State of Montana
State Capitol
Helena, Montana 59620
(406) 444-3111

The Honorable Marc Racicot, Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

The Honorable Richard H. Bryan, Governor
State of Nevada
State Capitol
Carson City, Nevada 89710
(702) 885-5670

The Honorable Brian McKay, Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

The Honorable Garrey Carruthers, Governor
State of New Mexico
418 State Capitol
Santa Fe, New Mexico 87503
(505) 827-3000

The Honorable Hal Stratton, Attorney General
State of New Mexico
The Honorable George W. K. Snyder, Jr., Assistant Attorney General and Director, Governmental Liaison Division
Counsel of Record
State of New Mexico
Bataan Memorial Building
Galisteo Street
Santa Fe, New Mexico 87503-1508
(505) 827-6000

The Honorable Henry Bellmon, Governor
State of Oklahoma
212 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-2342

The Honorable Robert H. Henry, Attorney General
State of Oklahoma
Room 112, State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

The Honorable Robert Casey, Governor
Commonwealth of Pennsylvania
225 Main Capitol
Harrisburg, Pennsylvania 17120
(717) 787-2500

The Honorable Ernest D. Preate, Jr., Attorney General
Commonwealth of Pennsylvania
Strawberry Square--16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

The Honorable George S. Mickelson, Governor
State of South Dakota
2nd Floor, State Capitol
Pierre, South Dakota 57501
(605) 773-3212

The Honorable Roger A. Tellinghuisen
Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

The Honorable Ned McWherter, Governor
State of Tennessee
State Capitol
Nashville, Tennessee 37219
(615) 741-2001

The Honorable Charles W. Burson, Attorney General & Reporter
State of Tennessee
The Honorable Michael W. Catalano, Deputy Attorney General
Counsel of Record
State of Tennessee
450 James Robertson Parkway
Nashville, Tennessee 37219-5025
(615) 741-3491

The Honorable Norman H. Bangerter, Governor
State of Utah
210 State Capitol
Salt Lake City, Utah 84114
(801) 533-5231

The Honorable R. Paul Van Dam, Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

The Honorable Booth Gardner, Governor
State of Washington
Legislative Building
Olympia, Washington 98504
(206) 753-6780

The Honorable Kenneth O. Eikenberry
Attorney General
State of Washington
Highways-Licenses Building
7th Floor, MS PB-71
Olympia, Washington 98504
(206) 753-6200

The Honorable Tommy G. Thompson, Governor
State of Wisconsin
115 E. State Capitol
P. O. Box 7863
Madison, Wisconsin 53707
(608) 266-1212

The Honorable Donald J. Hanaway, Attorney General
State of Wisconsin
The Honorable Daniel D. Stier, Assistant Attorney General
Counsel of Record
State of Wisconsin
Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-3067

Bernard Nash, Attorney at Law
Counsel of Record *
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

* Counsel of Record for the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington and the Commonwealths of Kentucky and Pennsylvania.

MARY F. KELLER
First Assistant Attorney General
Counsel of Record, State of Texas

(22)

FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO INTERVENE

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

May 18, 1989

15 pp

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of the Case	1
ARGUMENT –	
THE COURT SHOULD DEFER A DECISION ON THE PENDING MOTIONS TO INTERVENE AND STAY DISCOVERY UNTIL IT DETERMINES WHETHER TO OVERRULE *TEXAS v. NEW JERSEY* AND *PENNSYLVANIA v. NEW YORK*	5
Conclusion	11

TABLE OF AUTHORITIES

CASES:	Page
Aluminium Company of America v. Utilities Commission of the State of North Carolina, 713 F.2d 1024 (4th Cir. 1983)	7
Bottoms v. Dresser Industries, Inc., 797 F.2d 869 (10th Cir. 1986)	7
Bush v. Viterna, 740 F.2d 350 (5th Cir. 1984)	7, 9
Commonwealth of Virginia v. Westinghouse Electric Corporation, 542 F.2d 214 (4th Cir. 1976)	10-11
New Orleans Public Service, Inc. v. United Gas Pipe Line Company, 732 F.2d 452 (5th Cir.), *cert. denied sub nom. Morial v. United Gas Pipe Line Company*, 469 U.S. 1019 (1984)	10
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Spangler v. Pasadena City Board of Education, 552 F.2d 1326 (9th Cir. 1977)	10
State of California v. Tahoe Regional Planning Agency, 792 F.2d 775 (9th Cir. 1986)	7
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*
Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972)	7
FEDERAL RULES:	
Fed. R. Civ. P. 12(c)	6
Fed. R. Civ. P. 12(h)(2)	6

	Page
Fed. R. Civ. P. 24(a)(2)	6-7
Fed. R. Civ. P. 24(b)	10
SECONDARY AUTHORITY:	
7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* (1986)	7

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

BRIEF IN OPPOSITION TO MOTIONS FOR LEAVE TO INTERVENE

Statement of the Case

On May 31, 1988, the Court granted the motion by the State of Delaware ("Delaware") for leave to file a complaint. The complaint alleged that Delaware was entitled to possession of certain unclaimed property held by or formerly held by brokers ("debtor brokers") located in New York and incorporated in Delaware under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). In *Texas v. New Jersey*, the Court established a clear rule for determining which states with conflicting claims to intangible property are entitled to escheat. It adopted the rule that "since a debt is the property of the creditor, not of the debtor, fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-81 (footnotes omitted). New York answered on July 27, 1988.

New York and Delaware have both agreed that the rule in *Texas v. New Jersey* and in *Pennsylvania v. New York* governs this case; neither has sought to overrule it. However, they disagree concerning the facts of this case. Delaware contends that the addresses of the creditors ("creditor brokers") cannot be determined from the debtor's books and records and New York argues that the addresses of the creditors can be determined from such records.

Texas, on the other hand, seeks to have this Court in effect replace the rule in *Texas v. New Jersey* and *Pennsylvania v. New York* by distorting long-established principles of commercial law regarding debtor-creditor relationships.[1] It contends that this Court should adopt one of three novel rules, each of which basically asserts that abandoned property should be remitted to the state of incorporation of the issuer, not the state of the creditor's last known address or the state of the debtor. First, it asserts that, "[i]f the identity and location of the Beneficial Owner," who is not a even a creditor, having been paid in the ordinary course of business by the creditor broker, "is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law." Complaint in intervention ("Texas complaint") at 11. Second, it contends that the Court should adopt the same rule for all abandoned dividends and interest which it applies when a paying agent – an agent of the issuer – cannot find a last-known address for the record owner – a creditor – and remit the abandoned property to the state of incorporation of the issuer. *Id.* at 22-23. Finally, in the prayer for relief, Texas demands "all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code[.]" *Id.* at 39. It defines both "Excess Receipts" and "Additional Excess Receipts" in the complaint so broadly that they encompass property abandoned

---

[1] This Court granted Texas leave to file its complaint in intervention on February 21, 1989. New York answered on April 21, 1989.

by creditors with last-known addresses and those without any last-known address. *See id.* at 9-10, 13.

Each of the 21 states seeking leave to intervene adopts the legal theories advanced by Texas that the state of the issuer of the underlying security — not the state of last-known address of the creditor broker or the state of incorporation of the debtor broker — is entitled to escheat the abandoned dividends.[2] Most of the states also agree with the theory of Texas that each of them is entitled to escheat all of the abandoned dividends and interest attributable to issuers incorporated in its state regardless whether the creditor's address is known or unknown.[3]

The state applicants for intervention part company with Texas concerning remedy only, asserting that should this Court overrule *Texas v. New Jersey* and *Pennsylvania v. New York* and adopt the proposed Texas rule, Texas at that point could not adequately represent them because it would not have any incentive to search for unclaimed dividends and interest attributable to securities issued by companies incorporated in

---

[2] Thus, each of the states agree with Texas that when the beneficial owner — not the creditor broker — has no last-known address, the state of the issuer of the underlying security is entitled to escheat the abandoned dividends. *See* the complaint in intervention of Alabama, and 13 other states at 4; Arizona's complaint in intervention at 10; Connecticut's motion for leave to intervene at 3; Idaho's complaint in intervention at 8; New Mexico's motion to intervene at 3; Tennessee's complaint in intervention at 9; Virginia's motion for leave to intervene at 3; Wisconsin's complaint in intervention at 17-18.

[3] Thus, each of the complaints in intervention or motions for leave to intervene have prayers for relief which are virtually identical to that of Texas. *See* Arizona's complaint in intervention at 21; Connecticut's motion for leave to intervene at 5; Idaho's complaint in intervention at 11; New Mexico's motion to intervene at 6; Tennessee's complaint in intervention at 11; Virginia's motion for leave to intervene at 4; Wisconsin's complaint in intervention at 73. The prayer for relief in the complaint in intervention by Alabama and 13 other states, at 5, although slightly different, also disregards the address of the creditor broker. The District of Columbia contends that it is entitled to escheat abandoned dividends and interest attributable to issuers incorporated in the District. District of Columbia's complaint in intervention at 5. To the extent that it relies on this theory, its application also is premature.

their states. In the words of Alabama and 13 other states seeking leave to intervene:

> Texas, moreover, cannot be expected to identify, advocate and protect the rights of the States for several reasons: (1) Texas has no incentive to identify the property held by New York which properly belongs to the States. (2) Each State's claims are based on its own unclaimed property statute, which Texas cannot be expected to master so as to adequately represent the interests of the States. (3) Although Texas and the States dispute the right of Delaware and New York to the Funds, Texas and the States may assert conflicting claims thereto as the record becomes fully developed.

Brief of Alabama and 13 States in support of motion for leave to file complaint in intervention at 6-7.

The Special Master asked the parties to submit a proposed discovery schedule by May 12, 1989. Letter from Thomas Jackson, Esq. to counsel of record, dated April 4, 1989. Counsel for record for Alabama and 13 other states wrote to the Special Master on May 5, 1989, asking him to extend the deadline for submitting a proposed discovery schedule until 30 days after the Court ruled on the motions to intervene. Letter from Bernard Nash, Esq., to Thomas Jackson, Esq., dated May 5, 1989, at 1. On May 10, 1989, the counsel for New York informed the Special Master in a conference call with counsel for the other parties that New York intended to move before May 31, 1989, for judgment on the pleadings on the Texas complaint and for a stay of discovery against Texas pending determination by the Court of this motion. In the conference call, the Special Master deferred the deadline for submitting a proposed discovery schedule *sine die*.

ARGUMENT

THE COURT SHOULD DEFER A DECISION ON THE PENDING MOTIONS TO INTERVENE AND STAY DISCOVERY UNTIL IT DETERMINES WHETHER TO OVERRULE *TEXAS V. NEW JERSEY* AND *PENNSYLVANIA V. NEW YORK*

This Court, in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), fixed a bright line rule for determining the respective rights of States to unclaimed property. In *Texas v. New Jersey*, the Court concluded that the question of which state is entitled to escheat abandoned intangible property "should be settled once and for by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678. It held that "each item of property in question in this case is subject to escheat only by the State of the last known address of the creditor, as it is shown by the debtor's books and records." *Texas v. New Jersey*, 379 U.S. at 681-82. When the last known address cannot be determined from the debtor's books and records, "the property [is] subject to escheat by the State of [the debtor's] corporate domicile." *Id.* at 682. In that situation, however, the state where the debtor is incorporated may "cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat." *Id.*

Seven years later in *Pennsylvania v. New York*, the Court was called upon to reconsider the decision in *Texas v. New Jersey*. It flatly refused, holding that "to vary the application of the *Texas* rule . . . would require this Court to do precisely what we said should be avoided – that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts.' " *Pennsylvania v. New York*, 407 U.S. at 215 (citing *Texas v. New Jersey*, 379 U.S. at 679).

In accordance with this Court's previous holdings New York intends to move by May 31, 1989, for judgment on the pleadings

pursuant to Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure dismissing the Texas complaint, and for a stay of discovery pending the determination of this motion.* In light of this, the Court should defer deciding the pending motions to intervene until it decides the motion for judgment on the pleadings. Deferring a decision is consistent with the standards applied to intervention as of right, because Texas would adequately represent each of the state applicants for intervention concerning the legal theories it advances, which they adopt as their own, the short deferral would promote judicial economy, and deferral would not prejudice them. Moreover, granting permissive intervention at this stage of the proceedings, before resolving threshold legal issues, would be unduly burdensome and not add to the defense of the legal theories advanced by Texas.

The state applicants for intervention are not entitled to intervene as of right unless the Court decides to overrule *Texas v. New Jersey* and subsequently determines that Texas would not adequately represent them in establishing the amount of their claims. An applicant for intervention as of right under Rule 24(a)(2) of the Federal Rules of Civil Procedure may do so only if it satisfies each of the requirements of that rule: "When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that

---

* The overly broad and burdensome discovery request served by Texas on May 11, 1989, demonstrates the necessity of a short stay of discovery pending determination of the motions to intervene and for judgment on the pleadings. Texas demands that New York search its files for the past eleven years and supply the amounts remitted separately by year of abandoned dividends and interest attributable to all issuers, whether incorporated in Texas or not, by more than 550 debtor brokers. *See* Plaintiff in intervention Texas' first set of interrogatories propounded to defendant and first request for production of documents directed to defendant. Copies of these requests have been lodged with the Clerk. As New York intends to challenge these requests, the Court and parties should not be burdened with preliminary discovery issues which need never be reached should the Court grant New York's motion for judgment on the pleadings.

interest, unless the applicant's interest is adequately represented by existing parties." Fed. R. Civ. P. 24(a).

The applicant for intervention has the burden of demonstrating that no party in the case can adequately represent its interests. *Trbovich v. United Mine Workers of America*, 404 U.S. 528, 538 n.10 (1972). In the words of leading commentators, "The most important factor in determinating the adequacy of representation is how the interest of the absentee compares with the interests of the present parties." 7C C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1909 at 318 (1986) ("*Federal Practice and Procedure*") (footnote omitted). Although the burden of demonstrating inadequacy of representation ordinarily is "minimal," *Trbovich*, 404 U.S. at 538 n.10, when the interest of the party seeking to intervene "is identical to that of one of the present parties, . . . then a compelling interest should be required to demonstrate why this representation is not adequate." *Id.* § 1909 at 318-19 (footnote omitted). Thus, courts routinely deny intervention as of right when a person seeking intervention asserts an interest which is the same as an interest being asserted by a party. *Bottoms v. Dresser Industries, Inc.*, 797 F.2d 869, 873 (10th Cir. 1986); *State of California v. Tahoe Regional Planning Agency*, 792 F.2d 775, 779 (9th Cir. 1986) (each of the concerns of the proposed intervenor was being addressed by at least one of the parties); *Bush v. Viterna*, 740 F.2d 350, 356 (5th Cir. 1984) (per curiam) ("possibility that interests of intervenors and defendants might clash in some future dispute does not demonstrate the necessary adverse interest in a present suit"); *Aluminum Company of America v. Utilities Commission of the State of North Carolina*, 713 F.2d 1024, 1025 n.1 (4th Cir. 1983) (finding that "the interests of the existing plaintiffs and the movants coincide and that the plaintiffs adequately have represented those interests").

Under these standards, the state applicants for intervention have failed to meet their burden to demonstrate that Texas cannot adequately represent their interests at this stage of the proceedings. Since the legal theory relied upon by each of the state applicants is exactly the same as that of Texas, they will be

adequately represented by Texas' defense of this theory in the motion for judgment on the pleadings. As they admit in their motions, each of them adopts the Texas complaint fully and their only interest in joining this lawsuit is to participate in discovery to establish the amount of their claim under the Texas theory. *See* Statement of the Case at 3-4. According to Idaho, it "merely seeks to intervene in this action in order to preserve its rights should this Court rule favorably on the theory espoused by Texas." Motion for leave to intervene at 4. Virginia declared that it "does not seek to inject a new theory of the case, but, rather to join in the Texas complaint." Virginia's motion for leave to intervene at 11. Indeed, they have failed to make *any* attempt to explain why Texas could not represent them adequately on the threshold legal issue.

Furthermore, should Texas successfully defeat a motion for judgment on the pleadings and ultimately be successful in persuading this Court to overrule *Texas v. New Jersey* and *Pennsylvania v. New York*, Texas would continue to represent the claim of all the state applicants for intervention as each relies on the theory proposed by Texas to establish its claim to the property. Each of the state applicants would have a right to assert a claim funds held by New York at the conclusion of the lawsuit; therefore deferring any possible intervention until then could not impair their interests.

The key reason proposed by each of these states for seeking intervention by right is that Texas cannot and will not adequately represent their interests in discovery. This potential inadequacy need not be addressed at this point, since if the Court continues to adhere to its nearly quarter-century old rule in *Texas v. New Jersey*, and grants New York's motion for judgment on the pleadings by dismissing the Texas complaint, the claims of all the state applicants would also be defeated. Since every State currently seeking intervention has based its rights to any of the unclaimed funds solely on the legal theories espoused by Texas, each of them is adequately represented by Texas' defense to a motion by New York for judgment on the pleadings.

Indeed, several of the states requesting intervention have declared that Texas has offered to, and if the intervention is granted will, serve as lead counsel for these States.[5] The willingness of these states to allow Texas to act as lead counsel on behalf of their interests also demonstrates that Texas adequately represent their positions and, therefore, they are not entitled to intervene as of right. Denying intervention at this stage and deferring discovery will also serve the interests of judicial economy by avoiding potentially needless discovery conducted on the part of 21 states and the District of Columbia on issues which may never come before the Court. Additionally, since New York will move promptly for judgment on the pleadings and request that a stay of discovery be issued during the pendency of this motion, none of the state applicants seeking intervention based on the Texas complaint would be prejudiced.

The states are free to renew their motions for leave to intervene should this Court overrule *Texas v. New Jersey* and *Pennsylvania v. New York*. Courts will decline to permit intervention as of right at one stage of the proceedings where the person seeking to intervene will be adequately represented even though at some future stage, when the interests may become adverse, intervention may then become necessary. *See, e.g., Bush v. Viterna*, 740 F.2d at 358 ("the mere possibility that a party *may* at some future time enter into a settlement cannot alone show inadequate representation") (emphasis in original). In *Bush*, the court suggested the party seeking to intervene could do so at the settlement stage if it were able to meet its burden to show adversity of interest. *Id.*

Moreover, permissive intervention by 21 states and the District of Columbia at this preliminary juncture under Rule 24(b) of the Federal Rules of Civil Procedure would be unduly burdensome and would not add to the defense of the legal claim

---

[5] Arizona's motion for leave to intervene at 5; Connecticut's motion for leave to intervene at 4-5; New Mexico's motion for leave to intervene at 5; Tennessee's motion for leave to intervene at 5-6; Virginia's motion for leave to intervene at 3; Wisconsin's motion for leave to intervene at 9.

advanced by Texas and echoed by the other states. The principal consideration which a court must consider in determining whether to permit intervention is "whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." Fed. R. Civ. P. 24(b); 7C *Federal Practice and Procedure* § 1913 at 379. Intervention by Texas already opened the floodgates to requests for intervention by 22 additional applicants. Permitting them to intervene under Rule 24(b) could likely lead to the request for intervention by every state in the Union. Discovery could become exceedingly burdensome, if not unmanageable, and would involve many issues which might never come before the Court.

"In acting on a request for permissive intervention, it is proper to consider, among other things, 'whether the intervenors' interests are adequately represented by other parties' and whether they 'will significantly contribute to full development of the underlying factual issues in the suit.' " *New Orleans Public Service, Inc. v. United Gas Pipe Line Company*, 732 F.2d 452, 472 (5th Cir.), *cert. denied sub nom. Morial v. United Gas Pipe Line Company*, 469 U.S. 1019 (1984) (quoting *Spangler v. Pasadena City Board of Education*, 552 F.2d 1326, 1329 (9th Cir. 1977)). In that case, the court affirmed a district court order denying permissive intervention where the proposed intervenor and the plaintiff sought exactly the same relief on exactly the same grounds against the defendant, and there was no collusion between the plaintiff and the defendant. As demonstrated above, Texas will provide adequate representation of the interests of the state applicants and no factual development is required to resolve the motion for judgment on the pleadings.

Although the court in *Commonwealth of Virginia v. Westinghouse Electric Corporation*, 542 F.2d 214 (4th Cir. 1976), did not specifically rule on permissive intervention, the logic it adopted in denying Virginia intervention is particularly apt in denying permissive intervention in this case. It stated that it denied Virginia's request for intervention because such intervention could have the effect of encouraging another 13 states to intervene. In light of the added burden without any benefit,

"[t]he resultant complexity of the litigation, combined with increases in cost and judicial time, would hinder resolution of the present conflict. The trial court, deluged with additional briefs and pleadings, would be provided with no new viewpoints and little, if any, illumination to the original . . . disputes." *Virginia*, 542 F.2d at 217. The same considerations mandate deferring a decision on permissive intervention here until threshold legal issues are resolved.

CONCLUSION

For all the foregoing reasons, this Court should deny the motions to intervene or defer a ruling on the motions and stay discovery until after it resolves the motion for judgment on the pleadings.

Dated: New York, New York
May 18, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

No. 111 Original

Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST THE STATE OF TEXAS

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

May 26, 1989

TABLE OF CONTENTS

	Page
Table of Authorities	iii
THE RULE IN *TEXAS V. NEW JERSEY*	2
THE FUNDS AT ISSUE IN THIS CASE	4
THE CLAIMS ASSERTED BY THE PARTIES IN THIS CASE	4
TEXAS FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED	6
CONCLUSION	10

TABLE OF AUTHORITIES

	Page
CASES:	
Amersbach v. City of Cleveland, 598 F.2d 1033 (6th Cir. 1979)	6
Barbato v. Breeze Corp., 128 N.J.L. 309, 26 A.2d 53 (1942)	7
Davis v. Fraser, 307 N.Y. 433, 121 N.E.2d 406 (1954)	7
Greasy Brush Coal Co. v. Hays, 292 Ky. 517, 166 S.W.2d 983 (1942)	7
Homestake Oil Co. v. Rigler, 39 F.2d 40 (9th Cir. 1930)	7
McLaren v. Crescent Planning Mill Co., 117 Mo. App. 40, 93 S.W. 819 (1906)	7
Munro v. Mullen, 100 N.H. 128, 121 A.2d 312 (1956)	7
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Searles v. Gebbie, 115 A.D. 778, 101 N.Y.S. 199 (4th Dep't 1906)	7
Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Inc., 353 F. Supp. 264 (S.D.N.Y. 1972), *aff'd*, 495 F.2d 228 (2d Cir. 1974)	6
Slotnick v. Garfinkle, 632 F.2d 163 (1st Cir. 1980)	6
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*

	Page
STATUTES:	
U.C.C. § 8-207(1) (Supp. 1989)	7-8
RULES:	
Fed. R. Civ. P. 12(c)	1, 6
Fed. R. Civ. P. 12(h)(2)	1, 6
OTHER AUTHORITIES:	
11 Fletcher Cyclopedia of the Law of Private Corporations (Rev. ed. L. Zajdel ed. 1986)	7, 8
1 G. Hornstein, *Corporation Law and Practice* (1959)	7
2A J. Moore, *Federal Practice* (2d ed. 1987)	6
5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* (1969)	6

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF DELAWARE,

Plaintiff,

– against –

STATE OF NEW YORK,

Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST THE STATE OF TEXAS

The State of New York ("New York"), pursuant to Rule 42 of this Court's Rules and Rules 12(c) and 12(h)(2) of the Federal Rules of Civil Procedure, moves for judgment on the pleadings against the State of Texas ("Texas") to dismiss its complaint in intervention for failure to state a claim upon which relief can be granted and states as follows:

1. On May 31, 1988, the Court granted the motion by the State of Delaware ("Delaware") for leave to file a complaint against New York. The complaint alleged that Delaware was entitled to possession of certain unclaimed property held by or formerly held by brokers ("debtor brokers") located in New York and incorporated in Delaware under *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972).

2. New York answered on July 27, 1988.

3. This Court appointed Dean Thomas Jackson as Special Master on December 12, 1989.

4. On February 21, 1989, this Court granted Texas leave to file a complaint in intervention.

THE RULE IN *TEXAS V. NEW JERSEY*

5. This Court, in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), established a clear rule for determining the respective rights of States to unclaimed property. In *Texas v. New Jersey*, the Court concluded that the question of which state is entitled to escheat abandoned unclaimed intangible property "should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678. The abandoned unclaimed property in that case included "uncashed checks payable to shareholders for dividends on common stock" and "undelivered fractional stock certificates resulting from stock dividends" of Sun Oil Company, incorporated in New Jersey. 379 U.S. at 675 n.4.

6. Four different rules were proposed. Texas urged that "the State with the most significant 'contacts' with the debt should be allowed exclusive jurisdiction to escheat it." 379 U.S. at 678. In particular, it contended that "royalties, rents, and mineral proceeds derived from land located in Texas should be escheatable only by that State." *Id.* at 679 n.9. This Court did not believe that "the fact that an intangible is income from real property with a fixed situs is significant enough to justify treating it as an exception to a general rule concerning escheat of intangibles." *Id.* The Court concluded that the rule Texas advocated, however, would leave the question in "permanent turmoil" and was "not really any workable test at all." *Id.* at 678, 679.

7. New Jersey asserted that the state with power to escheat should simply be the state of the debtor's domicile. *Id.* at 679. Although this rule would have "the obvious virtues of clarity and

ease of application," it was not the only one which did, and it seemed to the Court that "in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the state in which the debtor happened to incorporate itself." *Id.* at 680.

8. Pennsylvania argued that the state in which the debtor had its principal offices should be entitled to escheat since that state was "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Id.* This rule, however, ignored the status of the debts as a liability of the debtor, not an asset, and would involve difficult questions concerning the location of the principal place of business. *Id.* at 680.

9. The Court adopted the rule proposed by Florida. It held that "each item of property in question in this case is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records." *Texas v. New Jersey*, 379 U.S. at 681-82. When the last known address cannot be determined from the debtor's books and records, "that the property be subject to escheat by the State of [the debtor's] corporate domicile." *Id.* In that situation, however, the state where the debtor is incorporated may "cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat." *Id.*

10. It gave four reasons for the last known address rule. First, "[a]doption of such a rule involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided." *Id.* at 681. Second, "the rule recognizes that the debt was an asset of the creditor." *Id.* Third, it "will tend to disbribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* Fourth, "by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified." *Id.*

11. Seven years later in *Pennsylvania v. New York*, the Court was called upon to reconsider the decision in *Texas v. New Jersey* on the ground that New York would receive a windfall if the rule were strictly applied. It flatly refused, holding that "to vary the application of the *Texas* rule . . . would require this Court to do precisely what we said should be avoided – that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever developing new categories of facts.' " *Pennsylvania v. New York*, 407 U.S. at 215 (citing *Texas v. New Jersey*, 379 U.S. at 679).

THE FUNDS AT ISSUE IN THIS CASE

12. The abandoned property which Delaware and Texas claim consists mainly of dividend and interest overpayments owed by one broker ("debtor broker") to another broker or bank ("creditor broker"). These overpayments were made by corporate paying agents of securities issuers to debtor brokers, which held the underlying securities in their own name for their customers (the "beneficial owners"). The debtor brokers then sold the securities to creditor brokers before the record date. The creditor brokers purchased the securities for their own customers but did not register the certificates before the record date. The creditor brokers have failed to claim the overpayments when the brokers attempted to reconcile their accounts. The debtor brokers left holding the overpayments owed to the creditor brokers have turned over this abandoned property to New York. *See* New York's brief in opposition to motion for leave to file complaint at 3-4. Texas has sought, in addition to these overpayments, overpayments remitted to New York which are held by the Depository Trust Company, a trust company incorporated in New York, and dividend and interest overpayments attributable to municipal and state bonds. *See* Texas complaint in intervention ("Texas complaint") at 10.

THE CLAIMS ASSERTED BY THE PARTIES IN THIS CASE

13. New York and Delaware have both recognized that the rule in *Texas v. New Jersey* and in *Pennsylvania v. New York*

governs this case. However, they disagree concerning the facts of this case. Delaware contends that the addresses of the creditors cannot be determined from the debtor's books and records and New York argues that the addresses of the creditors can be determined from such records.

14. Texas, on the other hand, seeks to have this Court replace the rule in *Texas v. New Jersey* and *Pennsylvania v. New York* by distorting long-established principles of commercial law regarding debtor-creditor relationships. It contends that this Court should adopt one of three rules, each of which basically asserts that abandoned property should be remitted to the state of incorporation of the issuer, not the state of the creditor's last known address or the state of the debtor. First, it asserts that, "[i]f the identity and location of the Beneficial Owner," who is not a even a creditor, having been paid in the ordinary course of business by the creditor broker, "is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law." Texas complaint at 11. Second, it contends that the Court should adopt the same rule for all abandoned dividends and interest which it applies when a paying agent – an agent of the issuer – cannot find a last-known address for the record owner – a creditor – and remit the abandoned property to the state of incorporation of the issuer. *Id.* at 22-23. Finally, in the prayer for relief, Texas demands "all of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code[.]" *Id.* at 39. It defines both "Excess Receipts" and "Additional Excess Receipts" in the complaint so broadly that they encompass property abandoned by creditors with last-known addresses and those without any last-known address. *See id.* at 9-10, 13.

15. Texas contends that its claim "is based on the practical reality of the manner in which securities are traded and distributions are paid, and relies upon a strict interpretation of this Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965)." Texas complaint at 11.

TEXAS FAILS TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

16. Accepting the allegations in the Texas complaint as true, it fails to state a claim upon which relief may be granted under this Court's rule in *Texas v. New Jersey* and *Pennsylvania v. New York*. Indeed, not only is the claim it asserts inconsistent with both decisions, but this Court expressly rejected similar rationales for the Texas theory in those cases.

17. Rule 12(h)(2) permits the defense of failure to state a claim upon which relief may be granted "to be raised in a motion for judgment on the pleadings pursuant to Rule 12(c)." *Shapiro v. Merrill Lynch, Pierce, Fenner & Smith Incorporated*, 353 F. Supp. 264, 268 (S.D.N.Y. 1972), *aff'd*, 495 F.2d 228 (2d Cir. 1974); *see also Slotnick v. Garfinkle*, 632 F.2d 163, 165 (1st Cir. 1980) (per curiam); *Amersbach v. City of Cleveland*, 598 F.2d 1033, 1038 (6th Cir. 1979); 5 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* ("*Federal Practice and Procedure*") § 1367 at 688-89 (1969). Nevertheless "the standards employed in determining the motion will be the same as if the defense had been raised prior to the closing of the pleadings." *Shapiro*, 353 F. Supp. at 268. The motion "is designed to provide a means of disposing of cases when the material facts are not in dispute and a judgment on the merits can be achieved by focusing on the content of the pleadings and any facts of which the court will take judicial notice." 5 *Federal Practice and Procedure* § 1367 at 685 (footnotes omitted); *Accord* 2A J. Moore, *Moore's Federal Practice* ¶ 12.15 at 12-106 (2d ed. 1987). In resolving the motion, "all of the well pleaded factual allegations in the adversary's pleadings are assumed to be true and all contravening assertions in the movant's pleadings are taken to be false." 5 *Federal Practice and Procedure* § 1368 at 691.

18. None of the approaches suggested by Texas states a claim upon which relief may be granted under this standard. Each is predicated on the novel and unprecedented theory that it is entitled to a portion of the "Excess Receipts" and "Additional Excess Receipts" since "they constitute a debt of the entity ('Issuer')

initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual ('Beneficial Owner') who has the economic rights to the security, including the entitlement to Distributions." Texas complaint at 10. Thus, it contends, "[i]f the identity and location of the Beneficial Owner is unknown, the state of incorporation of the Issuer should be entitled to collect the Excess Receipts under that state's unclaimed property law." *Id.* at 11. Even assuming that the identity and address of the beneficial owner is unknown, the beneficial owner is not a creditor of the issuer concerning the unclaimed dividends nor is the issuer a debtor.

19. The issuer is a debtor only to the shareholder of record – here, the debtor broker – and only between the record date and the payable date. It is a fundamental principle of corporate law that "[d]eclaration of a dividend sets up a debtor-creditor relationship between the corporation and its shareholders. It creates a debt for which, if unpaid, the shareholder may sue in an action at law." G. Hornstein, 1 *Corporation Law and Practice* § 472 at 594 (1959) ("*Corporation Law and Practice*") (footnotes omitted). *See also McLaren v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 46, 93 S.W. 819, 821 (1906) (and cases cited); *Searles v. Gebbie*, 115 A.D. 778, 780, 101 N.Y.S. 199, 201 (4th Dep't 1906). Thus, a corporation is liable for the payment of dividends and interest only to the shareholder of record until it receives notification of a transfer. *Homestake Oil Co. v. Rigler*, 39 F.2d 40, 41 (9th Cir. 1930) ("the corporation is protected in paying dividends to the record owner until notified of assignment and right to collect the dividends."); *Munro v. Mullen*, 100 N.H. 128, 121 A.2d 312 (1956) (holder of stock on record date entitled to the dividend); *Davis v. Fraser*, 307 N.Y. 433, 121 N.E.2d 406 (1954) (a corporation cannot be held liable at the instance of the actual owner if, in good faith, it paid the dividends to the record owner); *Barbato v. Breeze Corp.*, 128 N.J.L. 309, 26 A.2d 53 (1942) (same); *Greasy Brush Coal Co. v. Hays*, 292 Ky. 517, 166 S.W.2d 983 (1942) (same); 11 *Fletcher Cyclopedia of the Law of Private Corporations* § 5377 at 915 (Rev. ed. L. Zajdel ed. 1986) ("*Fletcher*") (footnote omitted); G. Hornstein, 1 *Corporation Law and Practice* § 472 at 593-94. The rule is the same

under the Commercial Code. U.C.C. § 8-207(1) (Supp. 1989) ("Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer . . . may treat the registered owner as the person *exclusively entitled* to vote, to receive notifications, and otherwise *to exercise all the rights and powers of an owner.*") (emphasis supplied).

20. The beneficial owner is not a shareholder of record and thus has no right to dividends against the corporate issuer; this is a right only belonging to the shareholder since "stock dividends are an incident of ownership of stock," 11 *Fletcher* § 5083 at 24-25 (footnote omitted). A share of stock is "the interest or right which the owner, who is called the 'shareholder,' has in the management of the corporation, and in its surplus profits." *Id.* § 5083 at 24 (footnote omitted). Whatever right a beneficial owner may have to dividends, therefore, lies solely against the beneficial owner's broker.

21. The allegations of the Texas complaint demonstrate that the issuers here have satisfied their debt to the shareholders. Texas states that it seeks dividends and interest which the issuers have paid to the record owners (here, debtor brokers). It defines the "Excess Receipts" it seeks as

> unclaimed *payments* of dividends, profits, principal, interest, and securities representing any of the foregoing ("Distributions") held or formerly held by the brokerage firms incorporated in the State of Delaware. The Excess Receipts are Distributions *received* by these brokerage firms for the benefit of their customers which exceed the amounts to which the brokerage firms are entitled.

Texas complaint at 9-10 (emphasis supplied). It states that "Additional Excess Receipts are of the same character and come into existence in the exact same manner as the Excess Receipts at issue in the principal case." *Id.* at 10. Since the issuer has, by definition, satisfied the obligation to pay dividends and interest to the record owner (here, the debtor broker), the assertion by Texas that the issuer is a "debtor" which owes a "debt" to the

beneficial owner is without merit. It necessarily follows that the theory that the issuer is a "debtor" fails to state a claim upon which relief may be granted.

22. Similarly deficient is the Texas claim that the Court should adopt the same rule for all abandoned dividends and interest it applies when a paying agent – an agent of the issuer – cannot find a last known address for the record owner – a creditor – and remit the abandoned property to the state of incorporation of the issuer. *Id.* at 22-23. In that case, the paying agent, as an agent of the issuer, is viewed as having the same address as its principal and the issuer is still a debtor which has not satisfied its debt to the creditor record holder. Thus, under *Texas v. New Jersey*, the state of the issuer's incorporation would be entitled to escheat (because the address of the creditor or record holder could not be determined). That, of course, is not the case here where the issuer has satisfied the record holder (here, the debtor broker). Therefore, this theory also fails to state a claim upon which relief may be granted.

23. Finally, the prayer for relief demanding "*all* of the Excess Receipts and Additional Excess Receipts paid or delivered to New York attributable to Issuers incorporated in the State of Texas and Texas Governmental Issuers which have been abandoned for the applicable dormancy period under the Texas Property Code[,]" Texas complaint at 39 (emphasis supplied), fails to state a claim cognizable under *Texas v. New Jersey*. Texas defines both "Excess Receipts" and "Additional Excess Receipts" so broadly that they include property abandoned by creditors with last-known addresses and those without any last-known address. *See* Texas complaint at 9-10, 13. Since the rule in *Texas v. New Jersey* expressly provides that the state of the creditor's last-known address is entitled to escheat, this theory as well fails to state a claim.

CONCLUSION

For all the foregoing reasons, this Court should grant New York judgment on the pleadings dismissing the Texas complaint.

Dated: New York, New York
May 26, 1989

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 341-2028

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General

CHRISTOPHER KEITH HALL
Assistant Attorney General
Counsel of Record

LAURA M. NATH
Assistant Attorney General
Of Counsel

Supreme Court, U.S.
FILED
MAY 26 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF DELAWARE,

STATE OF TEXAS, *Plaintiff,*

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

REPLY OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA TO THE STATE OF NEW YORK'S OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
Applicants for Intervention

May 26, 1989

[State Attorneys General Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

16 pp

ATTORNEYS GENERAL OF THE APPLICANTS FOR INTERVENTION

Don Siegelman, Attorney General
State of Alabama
State House, 11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

Warren Price, III, Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

Neil F. Hartigan, Attorney General
State of Illinois
100 W. Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Linley E. Pearson, Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

Robert T. Stephan, Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—Second Floor
Topeka, Kansas 66612
(913) 296-2215

Frederic J. Cowan, Attorney General
Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

William J. Guste, Jr., Attorney General
State of Louisiana
22nd Floor
State Capitol
Baton Rouge, Louisiana 70804
(504) 342-7013

Marc Racicot, Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

Brian McKay, Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

Robert H. Henry, Attorney General
State of Oklahoma
Room 112, State Capitol Building
Oklahoma City, Oklahoma 73105
(405) 521-3921

Ernest D. Preate, Jr., Attorney General
Commonwealth of Pennsylvania
Strawberry Square—16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

Roger A. Tellinghuisen, Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

R. Paul Van Dam, Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

Kenneth O. Eikenberry, Attorney General
State of Washington
Highways-Licenses Building
7th Floor, MS PB-71
Olympia, Washington 98504
(206) 753-6200

TABLE OF CONTENTS

	Page
ARGUMENT	1
The States Should Be Permitted To Intervene Because They Claim Property Which Also Is Claimed By New York And Delaware	1
A. Fundamental fairness requires granting intervention before decision on the governing law of the case	2
B. The States satisfy this Court's criteria for intervention	4
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Maryland v. Louisiana, No. 83 Original, Report of Special Master (May 14, 1980), *approved*, 451 U.S. 725 (1981) 2, 7, 8
NAACP v. New York, 413 U.S. 345 (1973) 2
Pennsylvania v. New York, 400 U.S. 811 (1970) .. 6
Pennsylvania v. New York, 407 U.S. 206 (1972) 3
Pennsylvania v. New York, No. 40 Original, October Term 1970, Report of Special Master on Applications of the States of California, Arizona, and Indiana for Leave to Intervene (February 8, 1971), *approved*, 401 U.S. 931 (1971) 2, 6, 7
Texas v. New Jersey, No. 13 Original, October Term 1962, Report of Special Master on Application of Florida for Permission to Intervene (May 10, 1963) 8
Texas v. New Jersey, 379 U.S. 674 (1965) 3
Trbovich v. United Mine Workers, 404 U.S. 528 (1972) 5
United States v. Louisiana, 354 U.S. 515 (1957) 3, 4, 6
Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961) 6

RULES

Fed. R. Civ. P. 24(a)(2) 5, 7
U.S. Supreme Court Rule 9.2 5

STATUTE

Pub. L. No. 93-495, 88 Stat. 1525, 12 U.S.C. § 2501 (October 28, 1974) 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

REPLY OF THE STATES OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA TO THE STATE OF NEW YORK'S OPPOSITION TO MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

ARGUMENT

The States Should Be Permitted To Intervene Because They Claim Property Which Also Is Claimed By New York And Delaware

Delaware and Texas do not oppose the Motion of the States of Alabama, *et al.* ("States") to intervene; they recognize that "such intervention ought not to cause any complication to, or hindrance or delay in, the proceeding to resolve the presently competing claims * * * of Delaware, New York and Texas" (Del. Resp. at 2; *see*

also Tex. Reply at 2). New York makes no showing to the contrary and asserts no prejudice to it from intervention. Nevertheless, New York contends that this Court should deny the States' motion or defer ruling thereon. While the absence of prejudice to New York in and of itself may be sufficient reason for rejecting its position, *cf. Maryland* v. *Louisiana*, No. 83 Original, Report of Special Master at 4 (May 14, 1980), *approved*, 451 U.S. 725, 745 n. 21 (1981), we shall show herein that New York's contentions are without merit, primarily because they are contrary to this Court's precedents in original jurisdiction cases, and emanate from a misunderstanding or mischaracterization of the States' proposed complaint.

A. Fundamental fairness requires granting intervention before decision on the governing law of the case

New York urges the Court to defer ruling on the motion for intervention, taking varying positions as to how long such deferral should last, *i.e.*, "until [the Court] decides [New York's as yet unfiled] motion for judgment on the pleadings" (N.Y. Opp. at 6), or until "the conclusion of the lawsuit" (N.Y. Opp. at 8).[1] In so arguing, New York assumes, *inter alia*, that resolution in its favor of its anticipated motion for judgment against Texas will dispose of the States' claims (N.Y. Opp. at 8). If this were so, however, it would argue strongly for, rather than against, allowing intervention at this time. For it would be fundamentally unfair to deny the States an

---

[1] New York is essentially making the novel argument that the States' Motion is too *early*, rather than too late, which in some instances is a basis for denying intervention (*cf. NAACP* v. *New York*, 413 U.S. 345 (1973)). If New York's concern about "opening the floodgates" to subsequent intervention by other states is justified, the proper way to address it is by challenging the timeliness of any such subsequent interventions. *See Pennsylvania* v. *New York*, No. 40 Original, October Term 1970, Report of Special Master on Applications of the States of California, Arizona, and Indiana for Leave to Intervene at 5 (February 8, 1971), *approved*, 401 U.S. 931 (1971).

opportunity to be heard as parties on a motion, the disposition of which could adversely affect their interests.

In urging that intervention by the States should be delayed because of the planned motion for judgment against Texas, New York necessarily assumes that Texas' complaint and the States' proposed complaint are virtually identical, which they are not.[2] It further assumes that the viability of the States' complaint depends on the overruling of this Court's earlier unclaimed property cases. New York, however, misstates the States' position. As was explained in the States' Brief in Support of Motion for Leave to File Complaint in Intervention ("States' Brief" at 3, emphasis added): "Delaware, New York and the States assert conflicting claims to the Excess Receipts *based on* the decisions of this Court in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972)," the very decisions which New York asserts the States seek to overrule.[3]

In *United States* v. *Louisiana*, 354 U.S. 515 (1957), this Court granted the motions of Alabama, Florida, Mississippi and Texas to intervene notwithstanding the fact that the United States *had previously filed* a motion for judgment on the pleadings, on grounds directly applicable to the instant motion:

---

[2] There are sufficient differences between the States' proposed complaint and Texas' complaint that decision on a motion for judgment on Texas' complaint will not necessarily be dispositive on the merits of the States' complaint. *See* discussion *infra* pp. 4-5. We note in this connection that the States have not "adopted" Texas' complaint. Texas' complaint is 41 pages, the States' only six. There are differences in the factual allegations. And resolution on the merits may ultimately depend on sustaining varying factual allegations, their relevance, and the application of the governing law (both federal and state) to the facts.

[3] It may be, however, that the Court ultimately will conclude, after development of the record is complete, that the law in this area should be re-examined in light of Congress' legislative disapproval of the holding in *Pennsylvania* v. *New York* in enacting Pub. L. No. 93-495, 88 Stat. 1525, 12 U.S.C. § 2501 (October 28, 1974).

> The Court has before it the motions of the United States for judgment and of Louisiana for leave to take depositions. As a result of its consideration of these matters, including the representations made by the State of Texas in its *amicus curiae* brief, the Court is of the opinion that *the issues in this litigation are so related to the possible interests of Texas, and other States situated on the Gulf of Mexico, in the subject matter of this suit, that the just, orderly, and effective determination of such issues requires that they be adjudicated in a proceeding in which all the interested parties are before the Court.*

Id. at 515-16 (emphasis added). The States submit that the same conclusion is warranted in the pending Motion to intervene.

B. The States satisfy this Court's criteria for intervention

The States are not seeking an abstract articulation of the law of abandoned property. Nor are the States seeking to intervene to support Texas' claim to any property which is the subject matter of the litigation. While there is substantial overlap in the *categories* of property sought by the States and Texas, the States assert a separate and distinct claim to *specific* property wrongfully taken or claimed by New York, including certain specific property within categories of property not put in issue by Texas.[4] Texas cannot be expected to pursue on the States' behalf this *specific* property claimed by the States.

Within the overlapping *categories* of property claimed both by the States and Texas, the States and Texas are not now asserting claims to the same property, but to entirely different property wrongfully taken or claimed by New York. Some of the property claimed by the States is also claimed by Delaware in addition to New

---

[4] The categories not put in issue by Texas consist of certain unclaimed property held by non-Delaware brokerage firms and by non-brokerage firm intermediaries in addition to clearinghouses (*see* Motion at 3; States' Brief at 3).

York. Moreover, as set forth in the States' Brief (at 6-7), as the facts develop, there may turn out to be some property to which Texas and the States do assert conflicting claims. Under the circumstances, the States' concrete interest in the property at issue in this action fully supports the grant of intervention, and renders representation of the States' interests by Texas inadequate.

New York, attempting to bring itself within the rubric of the requirements of Fed. R. Civ. P. 24, nevertheless argues that deferral is appropriate because Texas can adequately represent the States "concerning the legal theories it advances, which they adopt as their own," and because deferral "would promote judicial economy" (N.Y. Opp. at 6).[5] While the States in their Brief showed that they satisfy all of the requirements for intervention as of right set forth in Fed. R. Civ. P. 24(a)(2), they noted that, under Rule 9.2 of this Court, those requirements serve as a guide only. Precedents on intervention in original jurisdiction actions involving states establish the weight to be given those requirements, and under those precedents New York's arguments must be rejected and intervention granted.[6]

---

[5] New York's further contention, that the States would not be prejudiced by deferral (N.Y. Opp. at 6), has been disposed of above.

[6] New York cites a plethora of appellate court decisions which deny intervention when a party can adequately represent the interests of the applicant for intervention. It is sufficient to note that none are original jurisdiction cases involving states, which have no other neutral forum in which to protect their interests and litigate their claims. In addition, New York relies upon *Trbovich* v. *United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972), for the proposition that an "applicant for intervention has the burden of demonstrating that no party in the case can adequately represent its interests" (N.Y. Opp. at 7). In *Trbovich*, however, in the very footnote cited by New York, this Court noted that:

> [T]he requirement of the Rule is satisfied if the applicant shows that representation of his interest "may be" inadequate; and the burden of making that showing should be treated as minimal.

The controlling standard in original jurisdiction actions involving states is whether the state applicant for intervention claims an interest "in the subject matter of th[e] suit" (*United States* v. *Louisiana*, 354 U.S. at 516), not the extent to which an original state party might be able to protect the interests of an applicant state. Indeed, a due respect for the sovereignty of each state repels the proposition that one state can be required to have its rights represented by another state, rather than by its own chosen attorney. This is particularly so with respect to unclaimed funds which, because of due process restrictions, can be rightfully claimed by only one state. *Western Union Telegraph Company* v. *Pennsylvania*, 368 U.S. 71 (1961).

Thus, in *Pennsylvania* v. *New York*, *supra*, an unclaimed property suit, Pennsylvania sued Florida, Oregon, Virginia and New York. Each asserted claims to certain funds which conflicted with the claim of Pennsylvania. Connecticut moved for leave to intervene as a party plaintiff, advancing the same legal theory as Pennsylvania. The Court granted Connecticut's motion. 400 U.S. 811 (1970). California subsequently moved for leave to intervene as a party plaintiff, advancing a position substantially the same as Connecticut's and Pennsylvania's. Indiana also sought to intervene as a party plaintiff, asserting a claim under its unclaimed property statutes. Arizona sought leave to intervene as a party defendant, advancing a position virtually identical to Florida's.

The Special Master recommended that all three interventions be granted, noting that:

> [T]he same type of controversy exists between these three states and the states claiming in opposition to them as existed between the original parties to the case. *The position of California is the same as that of Connecticut whose motion for leave to intervene was granted by the Court. The position of Arizona*

> *appears to be the same as that of Florida.* Although the position of Indiana differs somewhat from each of the others, the presence of real controversy seems clear.

Pennsylvania v. *New York, supra,* Report of Special Master on Applications of the States of California, Arizona, and Indiana for Leave to Intervene at 4-5 (emphasis added). The Special Master's recommendation and report were adopted by this Court. 401 U.S. 931.

Similarly, in *Maryland* v. *Louisiana, supra,* where eight states challenged the constitutionality of a Louisiana tax, the Special Master recommended granting New Jersey's motion to intervene despite the pendency of a motion to dismiss. New Jersey "alleg[ed] facts comparable to those alleged by the complaining states and assert[ed] the same claims." Report of Special Master at 3. Indeed, New Jersey's complaint was "virtually indistinguishable" from that of the original plaintiffs, "merely add[ing] the facts applicable to it and its citizens." *Id.* at 4. This Court "agree[d] that New Jersey, whose allegations of injury are identical to that of the original plaintiff States, clearly has standing and should be permitted to intervene." 451 U.S. at 745 n. 21.

Moreover, even under the strict application of Rule 24(a)(2) advocated by New York, Texas cannot "adequately represent" the States, as New York asserts. First, the adequacy of representation standard is not limited to "legal theories * * * advance[d]" (N.Y. Opp. at 6), but applies to all facets of a case. Here, development of the facts with respect to the property at issue is likely to be crucial, and Texas cannot be expected to develop facts pertinent only to the States. Second, New York's argument is based on a mischaracterization of the States' position. Although there are, to be sure, important similarities between Texas' position and that of the States—most significantly, that Texas and the States are opposed to the positions of the original parties which fo-

cus, in general, on the headquarters or state of incorporation of the involved brokerage firm intermediaries—the States, as noted above, have not adopted Texas' complaint and legal theories *in toto*.

In addition, deferral would not promote judicial economy. Regardless of the outcome of any motion on Texas' complaint, the action will proceed on Delaware's complaint. As noted above, the States are claiming some of the property claimed by Delaware and New York which is not claimed by Texas (although, depending on the factual development, they may be claiming some of the same property claimed by Texas). The States could have filed an independent original action seeking that property and moved to consolidate it with this action. *Maryland* v. *Louisiana*, *supra*, Report of Special Master at 4. Under the circumstances, particularly where New York cannot claim any prejudice, judicial economy is promoted by allowing a single suit to proceed. *Id.* ("[f]iling as an intervenor has the advantage of promoting judicial economy"); *Texas* v. *New Jersey*, No. 13 Original, October Term 1962, Report of Special Master on Application of Florida for Permission to Intervene at 5 (May 10, 1963) (Florida's motion to intervene, in which it claimed certain property also claimed by another State, granted).

CONCLUSION

For the foregoing reasons, and those previously set forth in their Motion and Brief, the Motion of the States for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

Of Counsel:

DON SIEGELMAN
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WARREN PRICE, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, Hawaii 96813
(808) 548-4740

NEIL F. HARTIGAN
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 917-3000

LINLEY E. PEARSON
Attorney General
State of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—
Second Floor
Topeka, Kansas 66612
(913) 296-2215

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for
Applicants for Intervention

FREDERIC J. COWAN
Attorney General
Commonwealth of
Kentucky
State Capitol, Room 116
Frankfort, Kentucky 40601
(502) 564-7600

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, Louisiana
70804
(504) 342-7013

MARC RACICOT
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, Montana 59620
(406) 444-2026

BRIAN MCKAY
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 885-4170

ROBERT H. HENRY
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, Oklahoma
73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General
Commonwealth of
Pennsylvania
Strawberry Square—
16th Floor
Harrisburg, Pennsylvania
17120
(717) 787-3391

ROGER A. TELLINGHUISEN
Attorney General
State of South Dakota
State Capitol Building
500 East Capitol Street
Pierre, South Dakota 57501
(605) 773-3215

R. PAUL VAN DAM
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General
State of Washington
Highways-Licenses
Building
7th Floor, MS PB-71
Olympia,.Washington 98504
(206) 753-6200

May 26, 1989

No. 111 Original

(25)

Supreme Court, U.S.
FILED
JUN 1 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

STATE OF ARIZONA,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

REPLY OF STATE OF ARIZONA TO STATE OF NEW YORK'S OPPOSITION TO MOTION TO INTERVENE

ROBERT K. CORBIN
Attorney General of Arizona

IAN A. MACPHERSON
Assistant Attorney General
Chief Counsel, Tax Division
Counsel of Record

GAIL H. BOYD
Assistant Attorney General

Department of Law
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

Attorneys for The State of Arizona

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

4 pp

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

STATE OF ARIZONA,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

REPLY OF THE STATE OF ARIZONA TO STATE OF NEW YORK'S OPPOSITION TO MOTION TO INTERVENE

The State of Arizona ("Arizona") hereby replies to the Brief In Opposition to Motions For Leave to Intervene by the State of New York ("New York").

New York begins its opposition by misstating the legal position of Arizona. Arizona relies on *Texas v. New Jersey*, 379 U.S. 674 (1965) and *Pennsylvania v. New York*, 407 U.S. 206 (1972) and does not seek to overrule these

decisions. (Arizona Complaint, paragraphs 9 and 29.) The rule of unclaimed property law set forth in these opinions must be applied to the facts revealed by an examination of the entire securities distribution system. Arizona seeks to take custody of unclaimed intangible personal property when the identity of the owner is unknown to the holder, the distributions were made by the State of Arizona, local governmental entities of Arizona or by corporations incorporated in Arizona, and no claims by the owner has been asserted within the applicable dormancy period.

Arizona is moving for leave to file a complaint in intervention because it claims a right to take custody of a portion of the property which is the subject matter of this action. Arizona has not adopted the Complaint by Texas. Texas may act as lead counsel to enhance the effectiveness of response by the several states acting on their own behalf, but Texas does not represent Arizona. The property claimed by Texas is not the property claimed by Arizona.

The *Texas v. New Jersey* procedural ruling relating to intervention in original jurisdiction actions is also relied on by Arizona. A state is permitted to intervene in an original suit in the Supreme Court between states determining rights to unclaimed property where such state claims a right to a portion of the property involved. Also see *United States v. Louisiana*, 354 U.S. 515, 516 (1957). New York requests that leave to intervene be withheld until New York's motion for judgment on the pleadings is decided. This means that Arizona, a state which claims an interest in the property which is the subject matter of this suit, may never have an opportunity to advocate on its

own behalf. Rule 24(a)(2) of the Federal Rules of Civil Procedure is satisfied in the present situation.

New York does not claim that Arizona's application to intervene is untimely or that it is prejudiced by the intervention of Arizona and other interested states. The just, orderly and effective determination of the legal and factual issues requires that these issues be adjudicated in a proceeding in which all interested states are before the Court. The Motion of The State of Arizona for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General of Arizona

IAN A. MACPHERSON
Assistant Attorney General
Chief Counsel, Tax Division
Counsel of Record

GAIL H. BOYD
Assistant Attorney General

Department of Law
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

Attorneys for The State of Arizona

June 1, 1989

Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATE OF TEXAS,

Intervenor Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATEMENT OF THE STATE OF DELAWARE IN SUPPORT OF THE RELIEF SOUGHT BY THE STATE OF NEW YORK'S MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST THE STATE OF TEXAS

Charles M. Oberly, III
Attorney General of Delaware

Fred S. Silverman
Chief Deputy Attorney General

J. Patrick Hurley, Jr.
Assistant Attorney General

Richard L. Sutton, Counsel of Record
Jack B. Blumenfeld
James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1201 N. Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

June 7, 1989

SMITH-EDWARDS-DUNLAP COMPANY, 2867 E. ALLEGHENY AVENUE, PHILADELPHIA, PA 19134 (215) 425-8800

No. 111 Original

IN THE

Supreme Court of the United States

October Term, 1987

STATE OF DELAWARE,

Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATE OF TEXAS,

Intervenor Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

STATEMENT OF THE STATE OF DELAWARE IN SUPPORT OF THE RELIEF SOUGHT BY THE STATE OF NEW YORK'S MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST THE STATE OF TEXAS

The State of Delaware ("Delaware") joins in support of the Motion for Judgment on the Pleadings Against the State of Texas ("Texas") by the State of New York ("New York"). Delaware concurs with New York that the Complaint in Intervention filed by Texas is plainly inconsistent with, and contrary to, the "clear rule" declared by this Court in *Texas v. New Jersey*, 379 U.S. 674, 678 (1965) and reaffirmed in *Pennsylva-*

nia v. New York, 407 U.S. 206 (1972) for the escheat of "*all* types of intangible obligations" and "to which *all* States may refer with confidence." *Texas v. New Jersey, supra* at 678 (emphasis supplied). Accordingly, Delaware asks the Court to grant the relief sought herein by New York and to dismiss the Complaint in Intervention of Texas.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General of Delaware

FRED S. SILVERMAN
Chief Deputy Attorney General

J. PATRICK HURLEY, JR.
Assistant Attorney General

RICHARD L. SUTTON, Counsel of Record
JACK B. BLUMENFELD
JAMES LAWLESS, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Plaintiff
The State of Delaware

June 7, 1989

PROOF OF SERVICE

I, JAMES LAWLESS, IV, certify pursuant to Rule 28.5(b) of the Rules of the Supreme Court of the United States, that I represent plaintiff, the State of Delaware, that I am a member of the Bar of the Supreme Court of the United States, and that on the 12th day of June, 1989, I served copies of the foregoing Statement Of The State Of Delaware in support of the relief sought by the State of New York's Motion for Judgment on the Pleadings Against the State of Texas, on all parties required to be served by depositing such copies, first-class postage pre-paid, in a United States Post Office, addressed in accordance with the service list attached hereto.

James Lawless, IV
MORRIS, NICHOLS, ARSHT & TUNNELL
1105 North Market Street
Post Office Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Counsel for Plaintiff
the State of Delaware

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,

Plaintiff

against

STATE OF NEW YORK,

Defendant

REPORT OF THE SPECIAL MASTER ON MOTIONS TO INTERVENE

THOMAS H. JACKSON
Special Master

University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-7343

September 13, 1989

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,

Plaintiff

against

STATE OF NEW YORK,

Defendant

REPORT OF THE SPECIAL MASTER ON MOTIONS TO INTERVENE

This case commenced as a suit by the State of Delaware ("Delaware") against the State of New York ("New York), in which Delaware asserts a right to unclaimed property, mainly dividend and interest payments by corporations of various locations, held or formerly held by brokers located in New York and incorporated in Delaware. Involved, in the main, is the appropriateness and application of two cases on the issue of escheating of unclaimed property, Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York,

407 U.S. 206 (1972). The Court granted Delaware's motion for leave to file a complaint on May 31, 1988 and appointed the undersigned Special Master on December 12, 1988.

Shortly after this, other jurisdictions began to take more than a passing interest in this case. The State of Texas ("Texas") was the first to file a motion for leave to file a complaint in intervention, and its motion was granted by the Court on February 21, 1989. Numerous other states (plus the District of Columbia) have since then filed motions (variously labeled) to intervene, and, by order dated June 12, 1989, all of these motions filed as of that date were referred to the Special Master. These jurisdictions assert that portions of the monies at issue, attributable in the first instance to issuers incorporated in those jurisdictions, should escheat to them under their unclaimed property laws and under what they assert to be the correct interpretation of applicable precedents in this area.

New York has moved for judgment on the pleadings against Texas, and has opposed further motions to intervene by subsequent jurisdictions on the ground that "[t]he state applicants for intervention are not entitled to intervene as of right unless the Court decides to overrule *Texas v. New Jersey* and subsequently determines that Texas would not adequately represent them in establishing the amount of their claims." State of New York, Brief in Opposition to Motions for Leave to Intervene 6 (May 18, 1989). Furthermore, New York has requested that the Court should defer deciding the motions to intervene by the various jurisdictions until it decides the motion for judgment on the pleadings against Texas. *Id.* New York's motion for judgment on the pleadings was also referred to the Special Master by order dated June 12, 1989.

Although the number of jurisdictions seeking intervention is indeed large, I am convinced that New York's request to defer ruling on the motions to intervene should be denied.

Among other things, those jurisdictions seeking to intervene should be entitled to present their own defenses to a motion for judgment on the pleadings that is likely to affect their posture in this case as well. For, whether their stake in this lawsuit depends on the overruling of *Texas v. New Jersey* and *Pennsylvania v. New York* is, at bottom, an issue to be resolved, at the earliest, at the time of deciding the motion for judgment on the pleadings. It is enough for now to note that the jurisdictions seeking intervention purport to rely on these cases. Given that, they should be entitled to be heard on the motion for judgment on the pleadings, and that requires intervention before rather than after deciding such motion. Moreover, even in terms of judicial economy, the savings occasioned by proceeding the way suggested by New York are problematic. Should New York's motion against Texas on the pleadings be granted, it is at least conceivable that other states would then seek intervention, asserting that their basis for intervention differed substantively from Texas'. And, if New York's motion is not granted, the principal basis to reject intervention by other jurisdictions would then be that "applicant's interest is adequately represented by existing parties," FRCP 24(a), or "the intervention will unduly delay or prejudice the adjudication of the rights of the original parties," FRCP 24(b).

These issues are ripe for determination now. Intervention at this point will not unduly delay this case. And, while adequate representation of all the jurisdictions by a limited number of states seems possible, given that this is an original action and that states are sovereign entities, a generous intervention standard should be used, as the Court has appeared to use in the past. *See* Maryland v. Louisiana, 451 U.S. 725, 745 n. 21 (1981); United States v. Louisiana, 354 U.S. 515, 515-16 (1957). That way, such states have maximum latitude in presenting their own case. In saying this, I fully expect and hope that the various jurisdictions seeking

intervention can agree on methods for coordinating their positions. I view such agreed-upon coordination preferable, however, to a refusal to permit intervention. Accordingly, I recommend that the Court grant the various motions to intervene by the jurisdictions that have, to this point, filed such motions. A proposed order is attached.

Respectfully submitted,

THOMAS H. JACKSON
Special Master

University of Virginia
School of Law
Charlottesville, VA 22901
(804) 924-7343

September 13, 1989

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,

Plaintiff

against

STATE OF NEW YORK,

Defendant

PROPOSED ORDER

The motion of Alabama, et al. for leave to file a complaint in intervention is granted. The motion of Arizona for leave to file a complaint in intervention is granted. The motion of Connecticut for leave to intervene is granted. The motion of the District of Columbia to intervene is granted. The motion of Idaho for leave to file a complaint in intervention is granted. The motion of New Mexico for leave to intervene is granted. The motion of Tennessee for leave to intervene is granted. The motion of Virginia for leave to intervene is granted. The motion of Wisconsin for leave to intervene is granted. The parties are allowed sixty days within which to answer.

MOTION FILED
SEP 20 19

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NORTH CAROLINA FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

LACY H. THORNBURG
Attorney General of North Carolina

Andrew A. Vanore, Jr.
Chief Deputy Attorney General

M. Ann Reed
Senior Deputy Attorney General

Douglas A. Johnston
Assistant Attorney General

Office of the Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3377

Counsel for the State of North Carolina

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NORTH CAROLINA FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of North Carolina, a sovereign state of the United States of America, by and through its Attorney General, Lacy H. Thornburg, moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting it to adopt, to the extent appropriate, the complaint in intervention heretofore filed by the State of Texas, Plaintiff in Intervention. In support of this motion, the State of North Carolina would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property, described as "excess receipts" by the Plaintiff in Intervention State of Texas ("Texas") in its complaint in intervention and held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master in this case.

3. On February 21, 1989, the Court granted the motion of Texas to intervene and file its compliant in intervention in this case.

4. As set forth in its complaint, Texas claims the right to custodial possession of the excess receipts that constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of excess receipts held or formerly held by securities brokerage houses incorporated in Delaware that are attributable to issuers incorporated in Texas.

5. Texas also claims the right to custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company and addi-

tional excess receipts that have arisen in connection with distributions made by Texas municipal and other governmental issuers that are now being demanded by or remitted to New York. It is the understanding of the State of North Carolina ("North Carolina") that the Court may consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims that, if the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under that state's unclaimed property law.

7. North Carolina claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional receipts attributable to issuers incorporated in North Carolina and that portion attributable to North Carolina counties, municipalities, and other governmental entities.

8. The amount of excess receipts and additional excess receipts that North Carolina is entitled to claim is currently unknown. North Carolina has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess receipts. However, it is probable that at least one issuer incorporated in North Carolina has generated excess receipts and additional excess receipts. Moreover, it is a virtual certainty that bonds issued by North Carolina counties, municipalities and other governmental entities have generated additional excess receipts subject to the claim of North Carolina.

9. North Carolina asserts its claim pursuant to Chapter 116B of the General Statutes of North Carolina which provides, in essence, for the custodial taking of tangible and intangible personal property that is held in the ordinary course of the holder's business and has remained unclaimed by the owner for a period of five years.

10. North Carolina supports and adopts, as if fully set forth in these pleadings, Texas's complaint in intervention and the factual and legal arguments set forth therein, to the extent the same are applicable and relevant to the claims of North Carolina set forth in Paragraphs 7-9 above.

11. Although North Carolina adopts the complaint in intervention filed by Texas, it is essential that North Carolina be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law that will conclusively determine the future right of North Carolina to take possession of unclaimed property similar or idential in nature to the property at issue herein. Additionally, if North Carolina is to establish its right to take custodial possession of a portion of the property currently at issue, it must have access to the discovery process in order to identify those excess receipts and additional excess receipts attributable to issuers incorporated in North Carolina. As a party, North Carolina can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its unclaimed property laws and ordering New York to tender such property to North Carolina.

12. Based on the foregoing, North Carolina is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, North Carolina urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b).

13. The intervention of North Carolina in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to coordinate the effort among those states wishing to intervene and represent themselves in this case. The addition of North Carolina as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

II.

14. The Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. *See also, Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity that North Carolina seeks by urging this Court to grant leave to intervene.

Wherefore, North Carolina prays that it be permitted to intervene as a party plaintiff in this case, and to adopt, as its own and as if fully set forth, Texas's complaint in intervention, and the factual and legal arguments set forth therein, to the extent the same are relevant and applicable to the

claims of North Carolina, or alternatively prays that it be permitted to file its own complaint in intervention setting forth the factual and legal arguments asserted by Texas in its complaint and seeking, on behalf of North Carolina, relief of the same nature as Texas.

Respectfully submitted,

State of North Carolina
Lacy H. Thornburg, Attorney General

By: Douglas A. Johnston
Assistant Attorney General
Counsel of Record

LACY H. THORNBURG
Attorney General of North Carolina

Andrew A. Vanore, Jr.
Chief Deputy Attorney General

M. Ann Reed
Senior Deputy Attorney General

Douglas A. Johnston
Assistant Attorney General

Office of the Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3377

Counsel for the State of North Carolina

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF NORTH CAROLINA IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

TABLE OF CONTENTS

Page

JURISDICTION 11

STATEMENT OF THE CASE 11

SUMMARY OF ARGUMENT 12

ARGUMENT

I. NORTH CAROLINA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE, AND THE STANDARDS ESTABLISHED IN *TEXAS V. NEW JERSEY*, 379 U.S. 674 (1965) 13

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b), FEDERAL RULES OF CIVIL PROCEDURE 14

CONCLUSION 15

PROOF OF SERVICE 16

TABLE OF AUTHORITIES

Page

CASES

Pennsylvania v. New York, 407 U.S. 206 (1972) 11
Texas v. New Jersey, 379 U.S. 674 (1965) ..... passim

CONSTITUTION

Constitution of the United States,
Article III, Section 2 11

STATUTES

United States Code, Title 28, Section 1251(a) 11

RULES

Fed. R. Civ. P. 24 13
Fed. R. Civ. P. 24(a)(2) 13
Fed. R. Civ. P. 24(b) 14
U.S. Sup. Ct. R. 9.2 13

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF NORTH CAROLINA IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York. On February 21, 1989, the Court granted the motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its complaint in intervention in this case. Texas claims a portion of the unclaimed property at issue as well as additional unclaimed

property that is of the same nature and arises in the same way as the property already at issue. The State of North Carolina ("North Carolina") also claims a portion of the original property and the additional property at issue in this case. North Carolina seeks leave to intervene as a plaintiff in this suit and to adopt the complaint previously filed by Texas.

JURISDICTION

The Court has accepted original jurisdiction of this action pursuant to Article III, Section 2 of the Constitution of the United States and under United States Code Title 28, Section 1251(a).

STATEMENT OF THE CASE

The State of North Carolina seeks leave to intervene in this action, adopting the complaint filed by the State of Texas, Plaintiff in Intervention, as its own. That complaint and the motion for leave to intervene filed by North Carolina set forth the character of the property at issue and the entitlement of North Carolina, Texas, and the remaining states to claim a portion of that property. Generally, the property consists of excess receipts and additional excess receipts, as described by Texas in its complaint in intervention. These receipts result from the system of securities trading, involving brokerage firms incorporated in Delaware and other states and trading in New York and the Depository Trust Company, a New York corporation. The owner of the property at issue is unknown, and the property itself has become abandoned. Under current practice, the property is held for three years and then remitted to the State of New York.

The parties to this action all claim the property, or a portion thereof, pursuant to the rules of priority established by this Court in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). The parties differ, however, in their characterization of the un-

claimed property and to whom it is owed. As a result, each party has a different theory of who is the "owner" and who is the "holder" of the property. Delaware's position is that the unclaimed property results from a debt owed by brokers incorporated in Delaware to beneficial owners whose addresses are unknown. Under this theory, all the property escheats to Delaware as the state of incorporation of the "holders." New York claims that the property results from a debt owed by brokers to other brokers and banks which, for the most part, have trading addresses in New York. Under this theory, all the property escheats to New York as the state of last known address of the "holders." Texas takes the position that the unclaimed property is a result of a debt owed by the issuer of the security to the beneficial owner. If the address of the beneficial owner is unknown, the property goes to the "issuer's" state of incorporation. Under this theory, all 50 states share in the distribution of the property. North Carolina supports the Texas theory and seeks leave to intervene and to adopt the Texas complaint as its own.

SUMMARY OF ARGUMENT

I. North Carolina claims the right to custodial possession of portions of the property that is the subject of this suit and satisfies the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and the standards set out in *Texas v. New Jersey*. North Carolina is entitled to intervene as a matter of right.

II. North Carolina claims an interest in the property that is the subject of this suit, and the intervention of North Carolina will not unduly delay this action or prejudice the rights of the original parties. Having satisfied the requirements for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, North Carolina's motion for leave to intervene should be granted.

ARGUMENT

I. NORTH CAROLINA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE AND THE STANDARDS ESTABLISHED IN *TEXAS V. NEW JERSEY*, 379 U.S. 674(1965).

Rule 9.2 of the Rules of the Supreme Court provides that "[t]he form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court." Rule 24 of the Federal Rules of Civil Procedure governs intervention generally. That rule provides that anyone who applies timely shall be permitted to intervene in an action:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

North Carolina seeks leave of Court to intervene in this case because it claims an interest in the property that is the subject of this action. North Carolina claims all excess receipts that were issued by corporations domiciled in North Carolina. Likewise, North Carolina claims all additional excess receipts that were issued by North Carolina

domiciliaries and governmental entities. Although the amount of property subject to claim by North Carolina is difficult to estimate, it is substantial and sufficient to entitle North Carolina to intervene as a matter of right.

In the case of *Texas v. New Jersey*, this Court set a standard allowing any state that claimed an interest in the subject property to intervene in original actions involving unclaimed property. Because it claims a significant interest in the excess receipts and additional excess receipts at issue in this case, North Carolina has satisfied the test of *Texas v. New Jersey* and should be allowed to intervene.

The Court's decision in this case will determine North Carolina's rights to the property at issue in this case. It is, therefore, important that North Carolina be allowed to intervene and to participate in the discovery process to identify the specific property to which it is entitled. Although North Carolina seeks to adopt the Texas complaint, it is also important that North Carolina be allowed to advocate its own claim before the Court.

The standards for intervention as a matter of right have been satisfied, and North Carolina should be granted leave to intervene.

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 24(b) of the Federal Rules of Civil Procedure gives the Court discretion to allow permissive intervention where appropriate. As a sovereign state with a substantial interest in the outcome of this litigation, North Carolina should be allowed to intervene. North Carolina does not seek to interject a new theory of the case, but, rather, to join in

the Texas complaint and to coordinate its efforts with Texas toward the ultimate resolution of this litigation. It is apparent, therefore, that intervention by North Carolina will not unduly delay this action or prejudice the rights of the original parties. North Carolina has satisfied the standards for permissive intervention, and the Court should exercise its discretion to allow North Carolina to intervene.

CONCLUSION

For all these reasons, the motion of the State of North Carolina for leave to intervene as a plaintiff in this action and to adopt the complaint filed by the State of Texas should be granted. In the alternative, North Carolina should be granted leave to intervene and permitted to file its own complaint in intervention.

Respectfully submitted,

LACY H. THORNBURG
Attorney General

Douglas A. Johnston
Assistant Attorney General
Counsel of Record

LACY H. THORNBURG
Attorney General of North Carolina

Andrew A. Vanore, Jr.
Chief Deputy Attorney General

M. Ann Reed
Senior Deputy Attorney General

Douglas A. Johnston
Assistant Attorney General

Office of the Attorney General
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-3377

Counsel for the State of North Carolina

PROOF OF SERVICE

I, Douglas A. Johnston, Assistant Attorney General for the State of North Carolina, certify that I am a member of the bar of the Supreme Court of the United States, and that on the 22 day of September, 1989, I served copies of the State of North Carolina's motion for leave to intervene and adopt complaint and brief in support of motion for leave to intervene and adopt complaint on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

The Honorable Mario M. Cuomo
Governor of the State of New York
New York State Capitol
Eagle & Washington Avenues
Albany, New York 12224

The Honorable Robert Abrams
Attorney General of the State of New York
120 Broadway, 25th Floor
New York, New York 10271

Christopher Keith Hall
Assistant Attorney General of the
State of New York
Counsel of Record
120 Broadway
New York, New York 10271

The Honorable Michael N. Castle
Governor of the State of Delaware
820 North French Street, 12th Floor
Wilmington, Delaware 19801

The Honorable Charles M. Oberley, III
Attorney General of the State of Delaware
820 North French Street
Wilmington, Delaware 19801

Richard L. Sutton, Esquire
Counsel of Record
Morris, Nichols, Arsht & Tunnell
1105 N. Market Street
Post Office Box 1347
Wilmington, Delaware 19899

The Honorable William P. Clements, Jr.
Governor of the State of Texas
Post Office Box 12428
State Capitol
Austin, Texas 78711

The Honorable Jim Mattox
Attorney General of the State of Texas
Supreme Court Building
Post Office Box 12548
Capitol Station
Austin, Texas 78711

Mary Keller
First Assistant Attorney General
of the State of Texas
Counsel of Record
Supreme Court Building
Post Office Box 12548
Capitol Station
Austin, Texas 78711

Douglas A. Johnston
Assistant Attorney General

MOTION FILED
NOV 13 1989

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF MINNESOTA FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota
GREGORY P. HUWE
Assistant Attorney General
State of Minnesota
Counsel of Record
1100 Bremer Tower
Seventh Pl. & Minnesota St.
St. Paul, Minnesota 55101
Telephone: (612) 296-3546

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	Page
MOTION OF THE STATE OF MINNESOTA FOR LEAVE TO INTERVENE	1
COMPLAINT IN INTERVENTION OF THE STATE OF MINNESOTA	7
APPENDIX TO MOTION UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, MINN. STAT. §§ 345.31 - 345.60	A-1
PROOF OF SERVICE	Follows Appendix

TABLE OF AUTHORITIES

United States Constitution:	Page
Article III, Section 2 of the Constitution of the United States	8
Cases:	
Maryland v. Louisiana, 451 U.S. 725 (1981)	2
Pennsylvania v. New York, 407 U.S. 206 (1972)	6
Texas v. New Jersey, 379 U.S. 674 (1965)	10
United States v. Louisiana, 354 U.S. 515 (1957)	2
Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961)	5
United States Code:	
Section 1251 of Title 28 of the United States Code	8
Minnesota Statutes:	
Minn. Stat. § 345.31, *et seq.* (1988), as amended	4, 10
Minn. Stat. § 345.35 (1988)	4
Minn. Stat. § 345.39 (1988)	4
Federal Rules of Civil Procedure:	
Rule 24(a)(2), Federal Rules of Civil Procedure	5
Rule 24(b), Federal Rules of Civil Procedure	5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF MINNESOTA FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Minnesota, a sovereign state of the United States of America, by and through Hubert H. Humphrey, III, Attorney General for the State of Minnesota, moves this Court for an order permitting intervention in the above-styled case, and permitting the adoption, to the extent appropriate, of the brief in support of motion for leave to file a complaint filed by the State of Texas, the plaintiff in intervention. In support of this motion, the State of Minnesota states the following:

1. On or about May 31, 1988, this Court granted the motion of plaintiff, State of Delaware (Delaware), for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant, State of New York (New York), as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property (excess receipts),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson was appointed Special Master in this case.

3. On February 21, 1989, this Court granted the motion of Texas to intervene and file its complaint in intervention in this case.

4. On September 13, 1989, the Special Master filed his Report of the Special Master on Motions to Intervene. Citing *Maryland v. Louisiana*, 451 U.S. 725 (1981) and *United States v. Louisiana*, 354 U.S. 515 (1957), the Special Master recommended that the Court grant motions to intervene by eight additional states and the District of Columbia, on the grounds that the states are sovereign entities whose interests are affected and a generous intervention standard should be used.

5. On October 12, 1989, Texas filed a motion for leave to file an amended complaint in intervention.

6. As set forth in detail in its amended complaint, Texas claims a portion of the excess receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of the excess receipts

---

[1] In its amended complaint in intervention, the plaintiff in intervention, Texas, has defined certain terms relative to this case. The State of Minnesota incorporates those definitions in this motion by reference.

held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to issuers incorporated in Texas.

7. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company and excess receipts which have arisen in connection with distribution made by Texas municipal and other governmental issuers (additional excess receipts) which are now being demanded by or remitted to New York. It is the understanding of the State of Minnesota that the Court intends to consider claims to both the excess receipts originally at issue and the additional receipts identified by Texas.

8. Texas claims a portion of the excess receipts and the additional excess receipts for the reason that they constitute a debt owed by the issuer to the securities' beneficial owner. If the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under that state's unclaimed property law.

9. The State of Minnesota claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional excess receipts attributable to the issuers incorporated in the State of Minnesota and that portion attributable to Minnesota municipalities and other governmental issuers.

10. The amount of excess receipts and additional excess receipts that the State of Minnesota is entitled to claim is presently unknown. The State of Minnesota has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess receipts. It is probable that at least one issuer incorporated in the State of Minnesota

has generated excess receipts and/or additional excess receipts. Moreover, it is virtually certain that bonds issued by Minnesota municipalities and other governmental entities have generated additional excess receipts subject to the claim of the State of Minnesota.

11. The State of Minnesota asserts its claim pursuant to Minn. Stat. § 345.31, *et seq.* (1988), as amended, which provides that any stock or other intangible ownership interest in a business association and any dividend, distribution, or other sum payable to the owner as a result of the interest, which has remained unclaimed by the owner for seven years, is presumed abandoned and owing to the state, if it is held or owed by a business association organized under the laws of or created in the State of Minnesota. Minn. Stat. § 345.35 (1988). Moreover, all property in Minnesota not otherwise covered under any provision of the Minnesota law, including any income or increment thereon that is held or owing in this state in the ordinary course of the holder's business which has remained unclaimed by the owner for more than five years after it became payable or distributable, is presumed abandoned and payable to the state. Minn. Stat. § 345.39 (1988). The full text of Minnesota's Uniform Disposition of Unclaimed Property Act is set forth in the appendix to this motion.

12. The State of Minnesota supports and adopts as if set forth fully by the State of Minnesota in its own pleadings the brief in support of motion for leave to file by Texas, and the factual and legal arguments set forth therein, to the extent the same are applicable and relevant to the claims of the State of Minnesota set forth in paragraph 8 of this motion.

13. It is essential that the State of Minnesota be permitted to intervene in its own right in this proceeding. The decision of this Court will establish a rule of law which will conclu-

sively determine the future right of the State of Minnesota to claim and take possession of unclaimed property similar or identical in nature to the excess receipts and additional excess receipts at issue in this case. Additionally, if the State of Minnesota is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those excess receipts and additional excess receipts attributable to issuers incorporated in the State of Minnesota. As a party, the State of Minnesota can obtain a ruling from this Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to the State of Minnesota.

14. Based on the foregoing, the State of Minnesota is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, the State of Minnesota urges this Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b), Federal Rules of Civil Procedure.

15. The intervention of the State of Minnesota in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including the State of Minnesota, wishing to intervene and represent themselves in this case. The addition of the State of Minnesota as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

16. This Court in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states

over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that this Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. *See also Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claim that the State of Minnesota seeks by urging this Court to grant leave to intervene in this case.

THEREFORE, the State of Minnesota requests that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached complaint in intervention.

Respectfully submitted,

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

GREGORY P. HUWE
Assistant Attorney General
Counsel of Record
1100 Bremer Tower
7th Place and Minnesota Street
St. Paul, Minnesota 55101
Telephone: (612) 296-3546

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

COMPLAINT IN INTERVENTION OF THE STATE OF MINNESOTA

I.

INTRODUCTION

The State of Minnesota (Minnesota), the plaintiff in intervention, by Hubert H. Humphrey, III, Attorney General of the State of Minnesota, with leave first had, files this complaint in intervention in the above-styled and numbered cause, and states as follows:

II.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

III.

PENDING ACTION

2. On May 31, 1988, this Court granted the plaintiff State of Delaware's (Delaware) motion for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant State of New York (New York) as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible personal property held by securities brokerage firms in Delaware.

3. On February 21, 1989, this Court granted the State of Texas's (Texas) motion for leave to file a complaint in intervention. The Texas complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firms and non-brokerage firm intermediaries.

IV.

INTEREST AND CLAIM OF MINNESOTA

4. Minnesota acts by and through the Attorney General of Minnesota, the official of Minnesota charged with the duty under the Constitution and laws of Minnesota of prosecuting unclaimed property suits and representing Minnesota in litigation generally.

5. Minnesota seeks a determination of its rights to certain of the unclaimed intangible personal property, referred to as "excess receipts" and "additional excess receipts," which comes into being and acquires its character as unclaimed property in the context of securities transactions.

6. Minnesota is entitled to a portion of the excess receipts and additional excess receipts at issue in this litigation because they constitute a debt of the entity (issuer) initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual (beneficial owner) who has the economic rights to the security, including the entitlement to distributions.

7. If the identity and location of the beneficial owner is unknown, the state of incorporation of the issuer should be entitled to collect the excess receipts and additional excess receipts under that State's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the issuer state of incorporation when held by the issuer's paying agent, so it should be similarly remitted to the state of incorporation of the issuer when held by other agents in the securities holding, transfer, and distribution system. Distributions generated by issuers incorporated in Minnesota and those generated by Minnesota which are unclaimed and whose beneficial owner is unknown, should be returned to

Minnesota. The claim of Minnesota is based on the practical reality and manner in which securities are traded and distributions are paid, and relies upon a strict interpretation of the Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

8. By this action, Minnesota seeks a judgment that New York pay to Minnesota all excess receipts and additional excess receipts attributable to issuers incorporated in Minnesota and those that are attributable to issuers that are Minnesota municipalities or other governmental entities. Minnesota further seeks a declaration that it has the right in the future to claim and take possession of excess receipts and additional excess receipts without interference from any other state. Minnesota additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting excess receipts and additional excess receipts, and from expending any such sums collected, but presently unspent, which are attributable to issuers incorporated in Minnesota and to issuers that are Minnesota municipalities or other governmental entities, until such time as this controversy is resolved.

9. Minnesota asserts its claim pursuant to Minn. Stat. § 345.31, *et seq.* (1988), as amended, which provides, in essence, for the custodial taking of abandoned or unclaimed property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to such property has been asserted within the applicable dormancy period, which is seven years for stock and other intangible interests in business associations and five years for most other types of personal property in Minnesota.

V.

DEFINITIONS

10. Minnesota adopts by reference the definitions of the terms set forth by Texas in its amended complaint in intervention on pages 10 through 15.

VI.

PRAYER FOR RELIEF

THEREFORE, Minnesota requests that this Court grant the following relief:

1. That Minnesota be allowed to intervene in this case to protect its interests;

2. That New York be restrained and enjoined from collecting any excess receipts and additional excess receipts attributable to issuers incorporated or organized in Minnesota or attributable to Minnesota governmental issuers, and from expending any sums collected but presently unspent, consisting of such excess receipts and additional excess receipts, until such time as this controversy is resolved;

3. That New York be directed to pay or deliver to Minnesota all of the excess receipts and additional excess receipts paid or delivered to New York attributable to issuers incorporated or organized in Minnesota and Minnesota governmental issuers which have been abandoned for the applicable dormancy period under Minnesota's unclaimed property law.

4. That Minnesota be granted such other and further relief as the Court deems just and equitable.

HUBERT H. HUMPHREY, III
Attorney General
State of Minnesota

GREGORY P. HUWE
Assistant Attorney General
Counsel of Record
1100 Bremer Tower
7th Place and Minnesota Street
St. Paul, Minnesota 55101
Telephone: (612) 296-3546

November 8, 1989.

APPENDIX

APPENDIX TO MOTION
UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT, MINN. STAT. §§ 345.31 - 345.60

UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT

345.31 DEFINITIONS AND USE OF TERMS.

Subdivision 1. As used in sections 345.31 to 345.60, unless the context otherwise requires, the terms defined in this section shall have the meanings ascribed to them.

Subd. 2. "Banking organization" means any bank, trust company, savings bank, safe deposit company or private banker engaged in business in this state.

Subd. 3. "Business association" means any corporation, joint stock company, business trust, partnership, cooperative, or any association for business purposes of two or more individuals.

Subd. 3a. Commissioner. "Commissioner" means the commissioner of commerce.

Subd. 4. "Financial organization" means any savings and loan association, building and loan association, credit union, industrial loan and thrift company or investment company engaged in business in this state.

Subd. 5. "Holder" means any person in possession of property subject to sections 345.31 to 345.60 belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to sections 345.31 to 345.60.

Subd. 6. "Life insurance corporation" means any association or corporation, including a fraternal beneficiary associa-

tion as defined in section 64B.01, transacting within this state the business of insurance on the lives of persons or insurance appertaining thereto, including, but not by way of limitation, endowments and annuities.

Subd. 7. "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to sections 345.31 to 345.60 or the person's legal representative.

Subd. 8. "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

Subd. 9. "Utility" means any person who owns or operates within this state, for public use, any plant, equipment, property, franchise or license for the transmission of communications or the production, storage, transmission, sale, delivery or furnishing of electricity, water, steam or gas.

345.32 PROPERTY HELD BY BANKING OR FINANCIAL ORGANIZATIONS OR BY BUSINESS ASSOCIATIONS.

The following property held or owing by a banking or financial organization or by a business association is presumed abandoned:

(a) Any demand, savings or matured time deposit made in this state with a banking organization, together with any interest or dividend thereon, excluding contracted service charges which may be deducted for a period not to exceed one year, unless the owner has, within five years:

(1) increased or decreased the amount of the deposit, or presented the passbook or other similar evidence of the deposit for the crediting of interest; or

(2) corresponded in writing with the banking organization concerning the deposit; or

(3) otherwise indicated an interest in the deposit as evidenced by a memorandum on file with the banking organization; or

(4) received tax reports or regular statements of the deposit by mail from the banking or financial organization regarding the deposit. Receipt of the statement by the owner should be presumed if the statement is mailed first class by the banking or financial organization and not returned; or

(5) acted as provided in paragraphs (1), (2), (3) and (4) of this subsection in regard to another demand, savings or time deposit made with the banking or financial organization.

(b) Any funds or dividends deposited or paid in this state toward the purchase of shares or other interest in a business association where the stock certificates or other evidence of interest in the business have not been issued, or in a financial organization, and any interest or dividends thereon, excluding contracted service charges which may be deducted for a period not to exceed one year, unless the owner has within five years:

(1) increased or decreased the amount of the funds or deposit, or presented an appropriate record for the crediting of interest or dividends; or

(2) corresponded in writing with the financial organization concerning the funds or deposit; or

(3) otherwise indicated an interest in the funds or deposit as evidenced by a memorandum on file with the financial organization; or

(4) received tax reports or regular statements of the deposit or accounting by mail from the financial organization or business association regarding the deposit. Receipt of the statement by the owner should be presumed if the statement

is mailed first class by the financial organization or business association and not returned.

(c) Any sum, excluding contracted service charges which may be deducted for a period not to exceed one year, payable on checks certified in this state or on written instruments issued in this state, or issued in any other state the law in which for any reason does not apply to the abandonment of sums payable on checks certified in that state or written instruments issued in that state, on which a banking or financial organization or business association is directly liable, including, by way of illustration but not of limitation, drafts, money orders and traveler's checks, that has been outstanding for more than five years from the date it was payable, or from the date of its issuance if payable on demand, or, in the case of traveler's checks, has been outstanding for more than 15 years from the date of its issuance, or, in the case of money orders, has been outstanding for more than seven years from the date of its issuance, unless the owner has within five years, or within 15 years in the case of traveler's checks, or within seven years in the case of money orders, corresponded in writing with the banking or financial organization or business association concerning it, or otherwise indicated an interest as evidenced by a memorandum on file with the banking or financial organization or business association.

(d) Any funds or other personal property, tangible or intangible, removed from a safe deposit box or any other safekeeping repository in this state on which the lease or rental period has expired due to nonpayment of rental charges or other reason, that have been unclaimed by the owner for more than five years from the date on which the lease or rental period expired.

(1) If the amount due for the use or rental of a safe deposit box has remained unpaid for a period of six months, the bank, savings bank, trust company, savings and loan, or safe deposit company shall, within 60 days of the expiration of that period, send by certified mail, addressed to the renter or lessee of the safe deposit box, directed to the address standing on its books, a written notice that, if the amount due for the use or rental of the safe deposit box is not paid within 60 days after the date of the mailing of the notice, it will cause the safe deposit box to be opened and its contents placed in one of its general safe deposit boxes.

(2) Upon the expiration of 60 days from the date of mailing the notice, and in default of payment within the 60 days of the amount due for the use or rental of the safe deposit box, the bank, savings bank, trust company, savings and loan, or safe deposit company, in the presence of its president, vice-president, secretary, treasurer, assistant secretary, assistant treasurer or superintendent, or such other person as specifically designated by its board of directors, and of a notary public not in its employ, shall cause the safe deposit box to be opened and the contents thereof, to be removed and sealed by the notary public in a package, in which the notary public shall enclose a detailed description of the contents of the safe deposit box and upon which the notary public shall mark the name of the renter or lessee and, in the presence of one of the bank officers listed above, the notary public shall place the package in one of the bank's general safe deposit boxes and set out the proceedings in a certificate under the notary public's official seal, which shall be delivered to the bank, savings bank, trust company, savings and loan, or safe deposit company.

(3) The bank, savings bank, trust company, savings and loan, or safe deposit company shall hold the contents of abandoned safe deposit boxes until they are claimed by the owner or the bank turns them over to the commissioner pursuant to this chapter.

345.33 UNCLAIMED FUNDS HELD BY LIFE INSURANCE CORPORATIONS.

(a) Unclaimed funds, as defined in this section, held and owing by a life insurance corporation shall be presumed abandoned if the last known address, according to the records of the corporation, of the person entitled to the funds is within this state. If a person other than the insured or annuitant is entitled to the funds and no address of such person is known to the corporation or if it is not definite and certain from the records of the corporation what person is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured or annuitant according to the records of the corporation.

(b) "Unclaimed funds," as used in this section, means all moneys held and owing by any life insurance corporation unclaimed and unpaid for more than five years after the moneys became due and payable as established from the records of the corporation under any life or endowment insurance policy or annuity contract which has matured. A life insurance policy not matured by actual proof of the death of the insured is deemed to be matured and the proceeds thereof are deemed to be due and payable if such policy was in force when the insured attained the limiting age under the mortality table on which the reserve is based, unless the person appearing entitled thereto has within the preceding five years, (1) assigned, readjusted or paid premiums on the policy, or

subjected the policy to loan, or (2) corresponded in writing with the life insurance corporation concerning the policy. Moneys or drafts otherwise payable according to the records of the corporation are deemed due and payable although the policy or contract has not been surrendered as required.

345.34 DEPOSITS HELD BY UTILITIES.

Any deposit held or owing by any utility made by a subscriber after January 1, 1960, to secure payment for, or any sum paid in advance for, utility services to be furnished in this state, excluding any charges that may lawfully be withheld, that has remained unclaimed by the person appearing on the records of the utility entitled thereto for more than one year after the termination of the services for which the deposit or advance payment was made is presumed abandoned.

345.35 STOCK AND OTHER INTANGIBLE INTERESTS IN BUSINESS ASSOCIATIONS.

(a) Except as provided in paragraphs (b) and (e), stock or other intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, is presumed abandoned and, with respect to the interest, the association is the holder, if a dividend distribution or other sum payable as a result of the interest has remained unclaimed by the owner for seven years and the owner within seven years has not:

(1) communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest; or

(2) otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memo-

randum or other record on file with the association prepared by an employee of the association.

(b) At the expiration of a seven-year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least seven dividends, distributions, or other sums paid during the period, none of which has been claimed by the owner. If seven dividends, distributions, or other sums are paid during the seven-year period, the period leading to a presumption of abandonment commences on the date payment of the first such unclaimed dividend, distribution, or other sum became due and payable. If seven dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been seven dividends, distributions, or other sums that have not been claimed by the owner.

(c) The running of the seven-year period of abandonment ceases immediately upon the occurrence of a communication referred to in paragraph (a). If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back to the time a subsequent dividend, distribution, or other sum became due and payable.

(d) At the time an interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously presumed abandoned, is presumed abandoned.

(e) This section does not apply to any stock or other intangible ownership interest enrolled in a plan that provides

for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the interest unless the records available to the administrator of the plan show, with respect to any intangible ownership interest not enrolled in the reinvestment plan, that the owner has not within seven years communicated in any manner described in paragraph (a).

(f) For purposes of this section, stock or other intangible ownership interest in a business association is presumed abandoned if:

(1) it is held or owing by a business association organized under the laws of or created in this state; or

(2) it is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state.

345.36 PROPERTY OF BUSINESS ASSOCIATIONS AND BANKING OR FINANCIAL ORGANIZATIONS HELD IN COURSE OF DISSOLUTION.

All intangible personal property distributable in the course of a voluntary dissolution of a business association, banking organization or financial organization organized under the laws of or created in this state, that is unclaimed by the owner within two years after the date for final distribution, is presumed abandoned.

345.37 PROPERTY HELD BY FIDUCIARIES.

All intangible personal property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within five years after it becomes payable or distributable, increased or decreased the principal, accepted payment of

principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary if:

(a) the property is held by a banking organization or a financial organization or by a business association organized under the laws of or created in this state; or

(b) it is held by a business association, doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state; or

(c) it is held in this state by any other person.

345.38 PROPERTY HELD BY STATE COURTS AND PUBLIC OFFICERS AND AGENCIES.

Subdivision 1. All intangible personal property held for the owner by any court, public corporation, public authority or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner for more than five years is presumed abandoned except as provided in section 524.3-914.

Subd. 2. This section shall not apply to property held for persons while residing in public correctional or other institutions. As to such persons, said property shall be presumed abandoned if it has remained unclaimed by the owner for more than five years after such residence ceases.

Subd. 3. All intangible personal property held for the owner by any government or political subdivision or agency, that has remained unclaimed by the owner for more than five years is presumed abandoned and is reportable pursuant to section 345.41, if:

(a) the last known address as shown on the records of the holder of the apparent owner is in this state; or

(b) no address of the apparent owner appears on the records of the holder; and

(1) the last known address of the apparent owner is in this state; or

(2) the holder is domiciled in this state and has not previously transferred the property to the state of the last known address of the apparent owner.

345.381 PROPERTY HELD BY MINNESOTA PUBLIC PENSION FUND.

No amounts of money held or owing by a public pension fund enumerated in section 356.20, subdivision 2, or 356.30, subdivision 3, or governed by sections 69.77 or 69.771 to 69.776 shall be presumed to have been abandoned for purposes of sections 345.41, 345.42, 345.43, 345.47 and 345.48 if the plan governing the public pension fund includes a provision governing the disposition of unclaimed amounts of money.

345.39 MISCELLANEOUS PERSONAL PROPERTY HELD FOR ANOTHER PERSON.

Subdivision 1. Presumed abandonment. All intangible personal property, not otherwise covered by sections 345.31 to 345.60, including any income or increment thereon, but excluding any charges that may lawfully be withheld, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable is presumed abandoned. Property covered by this section includes, but is not limited to: (a) unclaimed wages or worker's compensation; (b) deposits or payments for repair or purchase of goods or services; (c) credit checks or memos, or customer overpayments; (d) unidentified remittances, unrefunded overcharges; (e) unpaid claims, unpaid accounts payable or unpaid commissions; (f) unpaid mineral proceeds,

royalties or vendor checks; and (g) credit balances, accounts receivable and miscellaneous outstanding checks. This section does not include money orders.

Subd. 2. Cooperative property. Notwithstanding subdivision 1, any profit, distribution, or other sum held or owing by a cooperative for or to a participating patron of the cooperative is presumed abandoned only if it has remained unclaimed by the owner for more than seven years after it became payable or distributable.

345.40 RECIPROCITY FOR PROPERTY PRESUMED ABANDONED OR ESCHEATED UNDER THE LAWS OF ANOTHER STATE.

If specific property which is subject to the provisions of sections 345.32, 345.35, 345.36, 345.37 and 345.39 is held for or owed or distributable to an owner whose last known address is in another state by a holder who is subjected to the jurisdiction of that state, the specific property is not presumed abandoned in this state and subject to sections 345.31 to 345.60 if:

(a) it may be validly claimed as abandoned or escheated under the laws of such other state; and

(b) the laws of such other state make reciprocal provision that similar specific property is not presumed abandoned or escheatable by such other state when held for or owed or distributable to an owner whose last known address is within this state by a holder who is subject to the jurisdiction of this state.

345.41 REPORT OF ABANDONED PROPERTY.

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under sections 345.31 to 345.60 shall report annually to the commissioner with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of $25 or more presumed abandoned under sections 345.31 to 345.60;

(2) in case of unclaimed funds of life insurance corporations, the full name of the policyholder, insured or annuitant and that person's last known address according to the life insurance corporation's records;

(3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under $25 each may be reported in aggregate;

(4) the date when the property became payable, demandable or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) other information which the commissioner prescribes by rule as necessary for the administration of sections 345.31 to 345.60.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed a name while holding the property, the holder shall file with the report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before November 1 of each year as of June 30 next preceding, but the report of life insurance corporations shall be filed before October 1 of each year as of December 31 next preceding. The commissioner may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under sections 345.31 to 345.60 knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, inform the owner of the steps necessary to prevent abandonment from being presumed.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer, and if made by a public corporation, by its chief fiscal officer.

(g) Holders of property described in section 345.32 shall not impose any charges against property which is described in section 345.32, clause (a), (b) or (c).

(h) Any person who has possession of property which the person has reason to believe will be reportable in the future as unclaimed property may, with the permission of the commissioner, report and deliver such property prior to the date required for reporting in accordance with this section.

345.42 NOTICE AND PUBLICATION OF LISTS OF ABANDONED PROPERTY.

Subdivision 1. On or before April 1 of each year, the commissioner shall cause notice to be published at least once but not more than twice in an English language newspaper of general circulation in the county in this state in which is located the last known address of any person to be named in the notice. If no address is listed or if the address is outside this state, the notice shall be published in the county in which the holder of the abandoned property has a principal place of business within this state.

Subd. 2. The published notice shall be entitled "notice of names of persons appearing to be owners of abandoned property," and shall contain:

(a) the names in alphabetical order and last known addresses, if any, of persons listed in the report and entitled to notice within the county as hereinbefore specified;

(b) a statement that information concerning the amount or description of the property and the name and address of the holder may be obtained by any persons possessing an interest in the property by addressing an inquiry to the commissioner; and

(c) a statement that if proof of claim is not presented by the owner to the holder and if the owner's right to receive the property is not established to the holder's satisfaction within 65 days from the date of the second published notice, the abandoned property will be placed not later than 85 days after such publication date in the custody of the commissioner to whom all further claims must thereafter be directed.

The commissioner is not required to publish in such notice any item of less than $25 unless the commissioner deems such publication to be in the public interest.

Subd. 3. On or before April 1 of each year, the commissioner shall mail a notice to each person having an address listed therein who appears to be entitled to property of the value of $25 or more presumed abandoned under sections 345.31 to 345.60. Said notice shall contain:

(a) a statement that, according to a report filed with the commissioner, property is being held to which the addressee appears entitled;

(b) the name and address of the person holding the property and any necessary information regarding changes of name and address of the holder; and

(c) a statement that, if satisfactory proof of claim is not presented by the owner to the holder by the date specified in the published notice, the property will be placed in the

custody of the commissioner to whom all further claims must be directed.

Subd. 4. This section is not applicable to sums payable on traveler's checks or money orders presumed abandoned under section 345.32.

345.43 PAYMENT OR DELIVERY OF ABANDONED PROPERTY.

Subdivision 1. Every person who has filed a report under section 345.41, within 20 days after the time specified in section 345.42 for claiming the property from the holder, or in the case of sums payable on traveler's checks or money orders presumed abandoned under section 345.32 within 20 days after the filing of the report, shall pay or deliver to the commissioner all abandoned property specified in the report, except that, if the owner establishes a right to receive the abandoned property to the satisfaction of the holder within the time specified in section 345.42, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the commissioner, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

Subd. 2. The commissioner may determine that the payment of abandoned property presents a hardship for a cooperative. On determining that a hardship exists, the commissioner may permit the cooperative to provide payment in equal installments over a period of three years.

(a) If legitimate claims to property reported by the cooperative to the commissioner exceed the installments paid, the excess shall immediately be paid by the cooperative to the commissioner and that amount shall be deducted from the subsequent installments.

(b) This subdivision shall apply only to abandoned property for which reports were filed within 12 months after July 1, 1977.

Subd. 3. Evidence of ownership. The holder of an interest under section 345.35 shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificates of ownership to the commissioner. Upon delivery of a duplicate certificate to the commissioner, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provision of section 345.44 to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the commissioner, for any losses or damages resulting to any person by the issuance and delivery to the commissioner of the duplicate certificate.

345.44 RELIEF FROM LIABILITY BY PAYMENT OR DELIVERY.

Upon the payment or delivery of abandoned property to the commissioner, the state shall assume custody and shall be responsible for the safekeeping thereof and for payment of any claim successfully brought against any holder on account of any abandoned property paid or delivered to the commissioner. Any person who pays or delivers abandoned property to the commissioner under sections 345.31 to 345.60 is relieved of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property by any claimant, including any state. The state indemnifies and holds harmless such person as against any such claim and any loss and damage related thereto, provided that such person shall notify the commissioner of any legal

proceedings against such person in relation to such claim within ten days after service of process upon such person and thus give the state an opportunity of defending such person in such proceeding. Any holder who has paid moneys to the commissioner pursuant to sections 345.31 to 345.60 may make payment to any person reasonably appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee reasonably appeared entitled thereto, the commissioner shall forthwith reimburse the holder for the payment.

345.45 INCOME ACCRUING AFTER PAYMENT OR DELIVERY.

When property is paid or delivered to the commissioner under sections 345.31 to 345.60, the owner is not entitled to receive income or other increments accruing thereafter.

345.46 PERIOD OF LIMITATION NOT A BAR.

The expiration of any period of time specified by statute or court order, during which an action or proceeding may be commenced or enforced to obtain payment of a claim for money or recovery of property, shall not prevent the money or property from being presumed abandoned property, nor affect any duty to file a report required by sections 345.31 to 345.60 or to pay or deliver abandoned property to the commissioner.

345.47 SALE OF ABANDONED PROPERTY.

Subdivision 1. Except as provided in subdivisions 3 and 5, all abandoned property other than money delivered to the commissioner under sections 345.31 to 345.60 shall be sold by the commissioner to the highest bidder at public sale in whatever city in the state the commissioner judges to afford the most favorable market for the property involved. The sale must be held whenever the commissioner deems necessary

but at least once every ten years. The commissioner may decline the highest bid and reoffer the property for sale if the commissioner considers the price bid insufficient. The commissioner need not offer any property for sale if of the opinion that the probable cost of sale exceeds the value of the property.

Subd. 2. Any sale held under this section shall be preceded by a single publication of notice thereof, at least three weeks in advance of sale in an English language newspaper of general circulation in the county where the property is to be sold.

Subd. 3. Securities listed on an established stock exchange shall be sold at the prevailing prices on the exchange. Other securities may be sold over the counter at prevailing prices or, with prior approval of the state board of investment, by another method the commissioner determines advisable. United States government savings bonds and United States war bonds shall be presented to the United States for payment.

Subd. 3a. Holding period. All securities presumed abandoned under section 345.35 and delivered to the commissioner must be held for at least three years before they are sold. A person making a claim under this section is entitled to receive either the securities delivered to the commissioner by the holder, if they still remain in the hands of the commissioner, or the proceeds received from the sale, but no person has any claim under this section against the state, the holder, any transfer agent, registrar, or other person acting for or on behalf of a holder for any appreciation in the value of the property occurring after delivery by the holder to the commissioner.

Subd. 4. The purchaser at any sale conducted by the commissioner pursuant to sections 345.31 to 345.60 shall receive title to the property purchased, free from all claims of the

owner or prior holder thereof and of all persons claiming through or under them. The commissioner shall execute all documents necessary to complete the transfer of title.

Subd. 5. The commissioner shall provide the Minnesota historical society with an inventory of abandoned property, other than money, six months prior to public sale. The society may select for its collections any items it finds of historical value. The society shall make its selection before the commissioner appraises or sorts the material for public sale. The society has 90 days from the date of notification by the commissioner to exercise the authority granted by this subdivision.

345.48 DEPOSIT OF FUNDS.

Subdivision 1. All funds received under sections 345.31 to 345.60, including the proceeds from the sale of abandoned property pursuant to section 345.47, shall forthwith be deposited by the commissioner in the general fund of the state; except that unclaimed restitution payments held by a court under section 345.38 shall be deposited in the crime victim and witness account created in section 609.101, subdivision 1. Before making the deposit the commissioner shall record the name and last known address of each person appearing from the holders' reports to be entitled to the abandoned property and of the name and last known address of each policyholder, insured person, or annuitant, and with respect to each policy or contract listed in the report of a life insurance corporation, its number, the name of the corporation, and the amount due. The record shall be available for public inspection at all reasonable business hours.

345.49 CLAIM FOR ABANDONED PROPERTY PAID OR DELIVERED.

Subdivision 1. Filing. Any person claiming an interest in any property delivered to the state under sections 345.31 to

345.60 may file a claim thereto or to the proceeds from the sale thereof on the form prescribed by the commissioner.

Subd. 2. Appropriation. There is hereby appropriated to the persons entitled to a refund, from the fund in the state treasury to which the money was credited, an amount sufficient to make the refund and payment.

345.50 DETERMINATION OF CLAIMS.

Subdivision 1. The commissioner shall consider any claim filed under sections 345.31 to 345.60 and may hold a hearing and receive evidence concerning it. If a hearing is held, the commissioner shall prepare a finding and a decision in writing on each claim filed, stating the substance of any evidence heard and the reasons for the decision. The decision shall be a public record.

Subd. 2. If the claim is allowed, the commissioner shall make payment forthwith. The claim shall be paid without deduction for costs of notices or sale or for service charges.

345.51 JUDICIAL ACTION UPON DETERMINATIONS.

Any person aggrieved by a decision of the commissioner or as to whose claim the commissioner has failed to act within 90 days after the filing of the claim, may commence an action in the district court to establish a claim. The proceeding shall be brought within 90 days after the decision of the commissioner or within 180 days from the filing of the claim if the commissioner fails to act. The action shall be tried de novo without a jury.

345.515 AGREEMENTS TO LOCATE REPORTED PROPERTY.

It is unlawful for a person to seek or receive from another person or contract with a person for a fee or compensation for locating property knowing it to have been reported or paid or delivered to the state treasurer pursuant to chapter 345

prior to seven months after the date of delivery of the property by the holder to the state treasurer as required by section 345.43.

No agreement entered into after seven months from the date of delivery of the property by the holder to the state treasurer is valid if a person thereby undertakes to locate property included in a report for a fee or other compensation exceeding ten percent of the value of the recoverable property unless the agreement is in writing and signed by the owner and discloses the nature and value of the property and the name and address of the holder thereof as such facts have been reported. Nothing in this section shall be construed to prevent an owner from asserting at any time that an agreement to locate property is based upon an excessive or unjust consideration.

345.52 ELECTION TO TAKE PAYMENT OR DELIVERY.

The commissioner, after receiving reports of property deemed abandoned pursuant to sections 345.31 to 345.60, may decline to receive any property reported on deeming it to have a value less than the cost of giving notice and holding sale, or the commissioner may, on deeming it desirable because of the small sum involved, postpone taking possession until a sufficient sum accumulates. Unless the holder of the property is notified to the contrary within 120 days after filing the report required under section 345.41, the commissioner shall be deemed to have elected to receive the custody of the property.

345.525 PROPERTY HAVING NO APPARENT COMMERCIAL OR HISTORICAL VALUE.

The commissioner may withhold the property from sales under this section. If it is determined that property delivered to the commissioner has no commercial or historical value the

commissioner may thereafter destroy or otherwise dispose of the property, and in that event no action or proceeding shall be brought or maintained against the state or any officer thereof or against the holder for or on account of any action taken by the commissioner pursuant to chapter 345 with respect to the property. The commissioner shall keep a record of all items destroyed under this section, and all items held by the historical society, including the name and address of the owner of the property and the person who delivered the property to the commissioner, the date of delivery, a description of the property destroyed and the date of destruction.

345.53 EXAMINATION OF RECORDS.

Subdivision 1. The commissioner may at reasonable times and upon reasonable notice examine the records of any person if there is reason to believe that the person has failed to report property that should have been reported pursuant to sections 345.31 to 345.60.

Subd. 2. If an examination of the records of a person results in the disclosure of property reportable and deliverable under sections 345.31 to 345.60, the commissioner may assess the cost of the examination against the holder at the rate of $15 per hour per examiner, but in no case may the charges exceed the value of the property found to be reportable and deliverable.

345.54 PROCEEDING TO COMPEL DELIVERY OF ABANDONED PROPERTY.

If any person refuses to deliver property to the commissioner as required under sections 345.31 to 345.60, or pay the interest provided for by section 345.55, subdivision 3, the commissioner may bring an action in a court of appropriate jurisdiction to enforce such delivery or payment.

345.55 PENALTIES.

Subdivision 1. Any person who willfully fails to render any report or perform other duties required under sections 345.31 to 345.60, shall be guilty of a misdemeanor.

Subd. 2. Any person who willfully refuses to pay or deliver abandoned property to the commissioner as required under sections 345.31 to 345.60 shall be guilty of a gross misdemeanor.

Subd. 3. In addition to any damages, penalties, or fines for which a person may be liable under other provisions of law, any person who fails to pay or deliver unclaimed property within the time prescribed by this chapter after written demand therefor by the commissioner made after March 29, 1978, shall pay to the commissioner interest at the rate of 12 percent per annum on the property or value thereof from the date of the written demand.

345.56 RULES.

The commissioner is hereby authorized to make necessary rules to carry out the provisions of sections 345.31 to 345.60.

345.57 EFFECT OF LAWS OF OTHER STATES.

Sections 345.31 to 345.60 shall not apply to any property that has been presumed abandoned or escheated under the laws of another state prior to July 1, 1969.

345.58 CUT OFF DATE.

Except as to property required to be reported pursuant to Minnesota Statutes 1967, sections 48.521 to 48.528, sections 345.31 to 345.60 shall not apply to property otherwise subject to sections 345.31 to 345.60 which became due or payable or which was in the possession of the holder before January 1, 1944.

345.59 UNIFORMITY OF INTERPRETATION.

Sections 345.31 to 345.60 shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

345.60 CITATION.

Sections 345.31 to 345.60 as enacted and hereafter amended, may be cited as the uniform disposition of unclaimed property act.

PROOF OF SERVICE

I, GREGORY P. HUWE, certify that I am counsel of record for Plaintiff in Intervention, the State of Minnesota, that I am a member of the Bar of the Supreme Court of the United States, and that on the 8th day of November, 1989, I served three copies of the foregoing Motion for Leave to Intervene and Complaint in Intervention, on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

The Honorable Thomas H. Jackson
Special Master
School of Law
University of Virginia
Charlottesville, Virginia 22901

The Honorable Robert Abrams
Attorney General
State of New York
Department of Law
120 Broadway, 25th Floor
New York, NY 10271

Christopher Keith Hall
Assistant Attorney General
Department of Law
120 Broadway
New York, NY 10271

The Honorable Roger A. Tellinghuisen
Attorney General of South Dakota
State Capitol
500 East Capitol Street
Pierre, SD 57501-5090

The Honorable Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, PA 17120

Janice L. Anderson
Deputy Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

Richard H. Forman
Solicitor General of Colorado
State Services Building
1525 Sherman Street
Denver, CO 80203

Daniel D. Stier
Assistant Attorney General of Wisconsin
123 West Washington Avenue
P.O. Box 7857
Madison, WI 53707-7857

Charles L. Stutts
Office of the Comptroller of Florida
The Capitol, Suite 1302
Tallahassee, FL 32399-0350

George W.K. Snyder, Jr.
Assistant Attorney General
Bataan Memorial Building
Santa Fe, NM 87503-1508

Samuel Shapiro
State Treasurer
State of Maine
Augusta, ME 04333

The Honorable Thomas J. Miller
Attorney General of Iowa
Hoover Building
Des Moines, IA 50319

The Honorable Jim Mattox
Attorney General of Texas
Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

Mary Keller
First Assistant Attorney General
Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

James A. Thomassen
Assistant Attorney General
P.O. Box 12548
Capitol Station
Austin, TX 78711

The Honorable Charles M. Oberley, III
Attorney General of the State of Delaware
820 North French Street, 8th Floor
Wilmington, DE 19801

Richard L. Sutton, Esq.
Morris, Nichols, Arsht & Tunnell
1105 N. Market Street
P.O. Box 1347
Washington, DC 19899

E. Suzanne Darling
Assistant Attorney General
Commonwealth of Virginia
Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219

Theodore V. Spangler, Jr.
Deputy Attorney General
P.O. Box 36
Boise, ID 83722

Ian A. McPherson
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, AZ 85007

William J. Prensky
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105

Michael W. Catalano
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, TN 37219-5025

Lutz Alexander Prager
Assistant Deputy Corporation Counsel
Office of the Corporation Counsel
Room 305, District Building
Washington, DC 20004

Bernard Nash, Esq.
Dickstein, Shapiro & Morin
2101 L Street, N.W.
Washington, DC 20037

The Honorable Don Siegelman
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, AL 36130

The Honorable Warren Price, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, HI 96813

The Honorable Neil F. Hartigan
Attorney General
State of Illinois
100 W. Randolph Street, 12th Floor
Chicago, IL 60601

The Honorable Linley E. Pearson
Attorney General
State of Indiana
219 State House
Indianapolis, IN 46204

The Honorable Robert T. Stephan
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—Second Floor
Topeka, KS 66612

The Honorable Frederic J. Cowan
Attorney General
Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, KY 40601

The Honorable William J. Guste, Jr.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, LA 70804

The Honorable Marc Racicot
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620

The Honorable Brian McKay
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

The Honorable Robert H. Henry
Attorney General
State of Oklahoma
Room 112, State Capitol Building
Oklahoma City, OK 73105

The Honorable R. Paul Van Dam
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114

The Honorable Kenneth O. Eikenberry
Attorney General
State of Washington
Highways-Licenses Building
7th Floor, MS PB-71
Olympia, WA 98504

Andrew J. Connick, Esq.
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, NY 10005

Judith Welcom, Esq.
Brown & Wood
One World Trade Center
New York, NY 10048

Douglas A. Johnson
Assistant Attorney General
State of North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Andrew Quinn
State Public Administrator
Michigan Attorney General's Office
Third Floor, Plaza 1 Bldg.
401 S. Washington Square
Lansing, MI 48913

Yeoryios C. Apallas, Esq.
Deputy Attorney General
State of California
Department of Justice
350 McAllister Street
Room 6000
San Francisco, CA 94102

James F. Flug, Esq.
Lobel, Novins, Lamont & Flug
1275 K St., NW
Suite 770
Washington, DC 20005

The Honorable Michael N. Castle
Governor of the State of Delaware
820 N. French Street, 12th Floor
Wilmington, Delaware 19801

The Honorable Mario M. Cuomo
Governor of the State of New York
New York State Capitol
Eagle & Washington Avenues
Albany, New York 12224

GREGORY P. HUWE
Assistant Attorney General
State of Minnesota

MOTION FILED
NOV 17 1989

No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,
v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF ARKANSAS, FLORIDA, IOWA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE AND WEST VIRGINIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

November 17, 1989

[State Attorneys General Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS GENERAL OF THE APPLICANTS FOR INTERVENTION

John Steven Clark, Attorney General
State of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

Robert A. Butterworth, Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

Thomas J. Miller, Attorney General
State of Iowa
Hoover Building—2nd Floor
Des Moines, Iowa 50319
(515) 296-2215

Mike Moore, Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

William L. Webster, Attorney General
State of Missouri
Supreme Court Building
101 High Street
Jefferson City, Missouri 65102
(314) 751-3321

John P. Arnold, Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

Roger W. Tompkins, II, Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF ARKANSAS, FLORIDA, IOWA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE AND WEST VIRGINIA FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia (hereinafter the "States"), sovereign states of the United States of America, by and through their Attorneys General and Special Counsel, move this Court for an order permitting them to intervene as Plaintiffs in the above-entitled case and permitting their proposed Complaint in Intervention, attached hereto, to be filed. In support of this motion, and as more fully set forth in the States' Brief in Support of Motion for Leave to File Complaint in Intervention, the States allege as follows:

I.

1. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware, referred to by Delaware as "Escheatable Property of Unknowns."

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. Texas, like Delaware, raised the issue as to which state is entitled to claim and take possession of "Escheatable Property of Unknowns," which it referred to as "Excess Receipts." The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by clearinghouses for the settlement of trades in securities, and unclaimed principal and interest payments on state and municipal obligations.

4. On various dates, the States of Arizona, Connecticut, Idaho, New Mexico, Tennessee, Virginia and Wisconsin, and the District of Columbia each filed a motion for leave to file a complaint in intervention and a proposed complaint substantively identical to that of Texas.

5. On April 21, 1989, the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (hereinafter "Alabama, *et al.*") filed a Motion for Leave to File Complaint in Intervention, a Complaint in Intervention, and a Brief in Support of Complaint in Intervention.

6. On September 13, 1989, the Special Master filed a report with the Court in which he recommended that the

Court grant each of the motions for leave to file a complaint in intervention referenced in paragraphs 4 and 5, *supra*.

7. On October 16, 1989, the Court accepted the Special Master's Report for filing.

8. On October 12, 1989, Texas filed a Motion for Leave to File Amended Complaint in Intervention, and an Amended Complaint in Intervention. On October 30, 1989, the Court referred Texas' motion to the Special Master.

9. On November 1, 1989, the Special Master issued "Litigation Management Order No. 1," dated as of October 18, 1989, in which, in paragraph 8, he stated:

> States considering intervention are requested to make a prompt determination of their plans, such that motions for leave to intervene can be filed thirty (30) days from the date of this order [October 18, 1989]. Prospective intervenors meeting this timetable will be treated on the same scheduling track as parties presently participating * * *.

10. The States' Complaint in Intervention is identical to the Complaint in Intervention filed by Alabama, *et al.*, and is filed in accordance with Litigation Management Order No. 1.

11. As set forth in the attached proposed Complaint in Intervention, the States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Receipts," as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (re-

gardless of where incorporated). Excess Receipts are Distributions received by these brokerage firms for the benefit of the entities or individuals who possess the economic rights to the securities, including the entitlement to Distributions ("Beneficial Owners"), but which do not reach the Beneficial Owners. Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time they generally are demanded by and are remitted to New York.

(b) "Additional Excess Receipts" consist of (i) Distributions presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities; and (ii) Distributions consisting of unclaimed principal and interest payments on state and municipal obligations. Additional Excess Receipts come into being in the same manner as Excess Receipts.

12. The Express Receipts and Additional Excess Receipts (collectively "Funds") claimed herein constitute unclaimed property which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities ("Issuer") do not reach the Beneficial Owner. Intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, act on behalf of the Issuer and the Beneficial Owner with respect to Distributions.

13. If the identity of the Beneficial Owner is unknown, Distributions by corporations ("Corporate Issuers") and state and local governmental entities ("Government Issuers") that are unclaimed should be remitted to the state in which the Corporate Issuer is incorporated, or to the state of the Government Issuer, pursuant to each such state's unclaimed property statute. Each State claims such Distributions by Corporate Issuers incorporated within that State or by Government Issuers of that State.

14. The amount of the Funds at issue in this litigation that the States are entitled to is presently unknown, but is substantial.

15. Upon information and belief, portions of the Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners.

16. The decision of the Court in this action will conclusively determine the right of the States to claim and take possesion of the Funds. If the contention of either Delaware or New York is sustained, the States will be precluded from claiming and taking possession of the Funds.

17. The States' interests are not adequately represented by the original parties because Delaware, New York and the States each assert conflicting claims to the Funds. The States' interests are not adequately represented by Texas or by other intervening jurisdictions because neither Texas nor the other intervening jurisdictions can be expected to identify, advocate and protect the rights of the States for several reasons: (i) they have no incentive to identify the property held by New York which properly belongs to the States; and (ii) each State's claims are based on its own unclaimed property statute, which neither Texas nor the other intervening jurisdictions can be expected to master so as to adequately represent the interests of the States.

18. The States' motion is timely because it is filed within the time specified in Litigation Management Order No. 1. Neither Delaware nor New York has responded to Texas' Amended Complaint in Intervention, to the Complaint in Intervention filed by Alabama, *et al.* or to the Complaints in Intervention filed by the eight jurisdictions referenced in paragraph 4, *supra*. Finally,

the States are represented by the same counsel representing Alabama, *et al.*, and are prepared to comply with the schedule specified in Litigation Management Order No. 1.

19. For the foregoing reasons, the States are entitled to intervene as a matter of right pursuant to Rule 24 (a) (2), Federal Rules of Civil Procedure.

II.

20. Alternatively, the States request this Court to exercise its discretion and allow intervention pursuant to Rule 24 (b) (2), Federal Rules of Civil Procedure.

21. A determination of the States' claims to the Funds involves questions of law or fact common to those already before the Court.

22. The States' intervention will aid in the resolution of factual issues and the application of the law to the facts.

23. The States' intervention will not unduly delay or prejudice the adjudication of the rights of the parties to this action.

24. The States' intervention will avoid a multiplicity of lawsuits by obviating the need for the States to file separate actions against New York, thus expediting the ultimate resolution of the entire controversy and promoting judicial economy and efficiency.

25. For the foregoing reasons, the States should be allowed permissive intervention pursuant to Rule 24 (b) (2), Federal Rules of Civil Procedure.

III.

26. In *Western Union Telegraph Company* v. *Pennsylvania*, 368 U.S. 71, 79 (1961), this Court recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and

take possession of unclaimed intangible personal property, and concluded that this Court is the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *See also Pennsylvania* v. *New York*, 407 U.S. 206 (1972); *Texas* v. *New Jersey*, 379 U.S. 674 (1965).

27. The States seek the opportunity to present their claims to this Court. This Court has allowed Texas to intervene in this action; and the Special Master has recommended that the motions to intervene of Alabama, *et al.*, seven other states and the District of Columbia be granted. For purposes of this motion the States stand in the same position as did Texas prior to the granting of its motion, and as did Alabama, *et al.* and the seven other states and the District of Columbia prior to the recommendation of the Special Master.

28. Wherefore, the States pray that their Motion for Leave to File Complaint in Intervention be granted.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)

GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER

DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

November 17, 1989

John Steven Clark, Attorney General
State of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

Robert A. Butterworth, Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

Thomas J. Miller, Attorney General
State of Iowa
Hoover Building—2nd Floor
Des Moines, Iowa 50319
(515) 296-2215

Mike Moore, Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

William L. Webster, Attorney General
State of Missouri
Supreme Court Building
101 High Street
Jefferson City, Missouri 65102
(314) 751-3321

John P. Arnold, Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

Roger W. Tompkins, II, Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF ARKANSAS, FLORIDA, IOWA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE AND WEST VIRGINIA,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendants.

COMPLAINT IN INTERVENTION OF THE STATES OF ARKANSAS, FLORIDA, IOWA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE AND WEST VIRGINIA

The States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia, Plaintiffs in Intervention, by and through their Attorneys General and Special Counsel, file this Complaint in Intervention and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms in Delaware.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and non-brokerage firm intermediaries.

III. INTEREST AND CLAIM OF PLAINTIFFS IN INTERVENTION

4. Plaintiffs in Intervention are the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia ("States").

5. The States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Express Receipts," as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of unclaimed payments of dividends, profits, principal, interest, and securities representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Excess Receipts are Distributions received by these brokerage firms for the benefit of the entities or individuals who possess the economic rights to the securities, including the entitlement to Distributions ("Beneficial Owners"), but which are not

distributed to the Beneficial Owners. Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the applicable dormancy period, after which time they generally are demanded by and are remitted to New York.

(b) "Additional Excess Receipts" consist of (i) Distributions presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as banks and clearinghouses for the settlement of trades in securities; and (ii) Distributions consisting of unclaimed principal and interest payments on state and municipal obligations. Additional Excess Receipts come into being in the same manner as Excess Receipts.

6. The Excess Receipts and Additional Excess Receipts (collectively "Funds") claimed herein constitute unclaimed property which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities ("Issuer") do not reach the Beneficial Owner. Intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, act on behalf of the Issuer and the Beneficial Owner with respect to Distributions.

7. If the identity of the Beneficial Owner is unknown, Distributions by corporations ("Corporate Issuers") and state and local governmental entities ("Government Issuers") that are unclaimed should be remitted to the state in which the Corporate Issuer is incorporated, or to the state of the Government Issuer, pursuant to each such state's unclaimed property statute. Each State claims such Distributions by Corporate Issuers incorporated within that State or by Government Issuers of that State.

8. Upon information and belief, portions of the Funds presently being remitted to New York are being commingled with the general funds of New York, are being

expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners.

PRAYER FOR RELIEF

WHEREFORE, the States pray:

1. That New York be restrained and enjoined from expending any Funds collected but presently unspent, and any Funds it may collect in the future, until such time as this controversy is resolved, and that all such Funds be kept in a segregated account;

2. That judgment be entered declaring that if the Beneficial Owner is unknown, the Funds held by brokerage firms and other intermediaries attributable to Corporate Issuers and Government Issuers are subject only to the claims of the state of incorporation of the Corporate Issuer or the state of the Government Issuer;

3. That New York be directed to pay or deliver to each of the States all Funds it has received and may receive, where the Beneficial Owners of the funds are unknown, that are attributable to Corporate Issuers incorporated in each such State and to Government Issuers of each such State, which presently are deemed abandoned pursuant to the applicable dormancy period under each such State's unclaimed property statute;

4. That New York be directed to pay or deliver to each of the States all remaining Funds it has received or may receive, where the Beneficial Owners of the Funds are unknown, that are attributable to Corporate Issuers incorporated in each such State and to Government Issuers of each such State, as such funds become abandoned pursuant to the applicable dormancy period under each such State's unclaimed property statute; and

5. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

November 17, 1989

John Steven Clark, Attorney General
State of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

Robert A. Butterworth, Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

Thomas J. Miller, Attorney General
State of Iowa
Hoover Building—2nd Floor
Des Moines, Iowa 50319
(515) 296-2215

Mike Moore, Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

William L. Webster, Attorney General
State of Missouri
Supreme Court Building
101 High Street
Jefferson City, Missouri 65102
(314) 751-3321

John P. Arnold, Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

Roger W. Tompkins, II, Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATES OF ARKANSAS, FLORIDA, IOWA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE AND WEST VIRGINIA IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

The States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia (hereinafter the "States"), by and through their Attorneys General and Special Counsel, hereby adopt and incorporate by reference as though fully recited herein, in support of their Motion for Leave to File Complaint in Intervention, (1) the Brief filed with this Court on April 21, 1989 by the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (hereinafter "Alabama, *et al.*") in Support of their Motion for Leave to File Complaint in Intervention, and (2) the Reply filed on May 26, 1989 by Alabama, *et al.* to the State of New

York's Opposition to Motion for Leave to File Complaint in Intervention.

On September 13, 1989, the Special Master filed a Report with the Court in which he recommended that the Court grant the motions for leave to intervene and to file a complaint in intervention filed by Alabama, *et al.* and by eight other jurisdictions: the States of Arizona, Connecticut, Idaho, New Mexico, Tennessee, Virginia and Wisconsin, and the District of Columbia. On October 16, 1989, this Court accepted the Special Master's Report for filing.

On October 12, 1989, Texas filed a Motion for Leave to File Amended Complaint in Intervention, and an Amended Complaint in Intervention. Texas' amended complaint made subject to this suit the same category of property claimed by Alabama, *et al.* and by the States. On October 30, 1989, the Court referred Texas' motion to the Special Master.

On November 1, 1989, the Special Master issued "Litigation Management Order No. 1," dated as of October 18, 1989, in which, in paragraph 8, he stated:

> States considering intervention are requested to make a prompt determination of their plans, such that motions for leave to intervene can be filed thirty (30) days from the date of this order [October 18, 1989]. Prospective intervenors meeting this timetable will be treated on the same scheduling track as parties presently participating * * *.

The States' interests are not adequately represented by the original parties because Delaware, New York and the States each assert conflicting claims to the Funds. The States' interests are not adequately represented by Texas or by the other intervening jurisdictions because neither Texas nor the other intervening jurisdictions can be expected to identify, advocate and protect the rights of the States for several reasons: (i) they have no incentive

to identify the property held by New York which properly belongs to the States; and (ii) each State's claims are based on its own unclaimed property statute, which neither Texas nor the other intervening jurisdictions can be expected to master so as to adequately represent the interests of the States.

The States' motion is timely because it is filed within the time specified in Litigation Management Order No. 1, prior to the start of discovery under that Order. Neither Delaware nor New York has responded to Texas' Amended Complaint in Intervention, to the Complaint in Intervention filed by Alabama, *et al.* or to the Complaints in Intervention filed by the eight other jurisdictions. Moreover, the States are represented by the same counsel representing Alabama, *et al.*, seek leave to file a Complaint in Intervention identical to that filed by Alabama, *et al.*, and are prepared to comply with the schedule specified in Litigation Management Order No. 1.

This Court has allowed Texas to intervene in this action; and the Special Master has recommended that the motions to intervene of Alabama, *et al.* and of eight other jurisdictions be granted. For purposes of this motion the States stand in the same position as did Texas prior to the granting of its motion, and as did Alabama, *et al.* and the eight other jurisdictions prior to the recommendation of the Special Master. Therefore, intervention in this suit by the States not only is appropriate, but is necessary for the equitable resolution of this controversy.

CONCLUSION

For the reasons stated, the Motion of the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER

DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

November 17, 1989

John Steven Clark, Attorney General
State of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

Robert A. Butterworth, Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

Thomas J. Miller, Attorney General
State of Iowa
Hoover Building—2nd Floor
Des Moines, Iowa 50319
(515) 296-2215

Mike Moore, Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

William L. Webster, Attorney General
State of Missouri
Supreme Court Building
101 High Street
Jefferson City, Missouri 65102
(314) 751-3321

John P. Arnold, Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

Roger W. Tompkins, II, Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

MOTION FILED
NOV 17 1989

No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,
v.

STATE OF NEW YORK,
Defendant.

APPENDIX TO THE BRIEF OF THE STATES OF ARKANSAS, FLORIDA, IOWA, MISSISSIPPI, MISSOURI, NEW HAMPSHIRE AND WEST VIRGINIA, IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

BERNARD NASH
(Counsel of Record)
GEORGE KAUFMANN
ANDREW P. MILLER
LESLIE R. COHEN
PETER J. KADZIK
STEVEN B. SNYDER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

November 17, 1989

[State Attorneys General Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS GENERAL OF THE APPLICANTS FOR INTERVENTION

John Steven Clark, Attorney General
State of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

Robert A. Butterworth, Attorney General
State of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

Thomas J. Miller, Attorney General
State of Iowa
Hoover Building—2nd Floor
Des Moines, Iowa 50319
(515) 296-2215

Mike Moore, Attorney General
State of Mississippi
P.O. Box 220
Jackson, Mississippi 39205
(601) 359-3680

William L. Webster, Attorney General
State of Missouri
Supreme Court Building
101 High Street
Jefferson City, Missouri 65102
(314) 751-3321

John P. Arnold, Attorney General
State of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

Roger W. Tompkins, II, Attorney General
State of West Virginia
State Capitol
Charleston, West Virginia 25305
(304) 348-2021

TABLE OF CONTENTS

	Page
Ark. Stat. Ann. §§ 18-28-201 to 18-28-213 (1987 & Supp. 1987)	1a
Fla. Stat. Ann. §§ 717.101 to 717.119 (West 1988)	6a
Iowa Code Ann. §§ 556.1 to 556.13 (West Supp. 1989)	16a
Miss. Code Ann. §§ 89-12-3 to 89-12-29 (Supp. 1989)	22a
Mo. Ann. Stat. §§ 447.503 to 447.543 (Vernon 1986 & Supp. 1989), as amended by Mo. House Bill No. 506, 85th General Assembly (effective August 28, 1989)	29a
N.H. Rev. Stat. Ann. §§ 471-C:1 to 471-C:21 (Supp. 1988)	35a
W. Va. Code §§ 36-8-1 to 36-8-13 (1985)	44a

APPENDIX

RELEVANT PROVISIONS OF PLAINTIFFS' IN INTERVENTION UNCLAIMED PROPERTY STATUTES

ARKANSAS

Ark. Stat. Ann. §§ 18-28-201 to 18-28-213 (1987 & Supp. 1987)

18-28-201. Definitions and use of terms.

As used in this subchapter, unless the context otherwise requires:

* * * *

(2) "Business association" means any corporation, other than a public corporation, joint stock company, business trust, partnership, or any association for business purposes of two (2) or more individuals;

* * * *

(4) "Holder" means any person in possession of property subject to this subchapter belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this subchapter;

* * * *

(6) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this subchapter, or his legal representative;

(7) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two (2) or more persons having a joint or common interest, or any other legal or commercial entity;

* * * *

(9) "Auditor" means the Auditor of the State of Arkansas or his designee.

(10) (A) "Intangible property" includes:

(i) Moneys, checks, drafts, deposits, interest, dividends, and income;

(ii) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;

(iii) Stocks and other intangible ownership interests in business associations;

(iv) Moneys deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;

(v) Amounts due and payable under the terms of insurance policies; and

(vi) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits;

(B) All abandoned property not covered as intangible will be considered tangible;

* * * *

(14) "Underlying shares" means an ownership interest in a business association, the evidence of which, generally a stock certificate, is in the possession of the missing owner.

* * * *

18-28-205. Undistributed dividends and distributions of business associations.

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on prin-

cipal, or other sum held or owing by a business association for, or to, a shareholder, certificate holder, bondholder, or other security holder, who has not claimed it, or corresponded in writing with the business association concerning it, within seven (7) years after the date prescribed for payment or delivery, is presumed abandoned if:

(a) It is held or owing by a business association organized under the laws of, or created in, this state; or

(b) It is held or owing by a business association doing business in this state, but not organized under the laws of, or created in, this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state.

(c) Underlying shares are presumed abandoned when the owner fails to exercise rights of ownership, including, but not limited to, cashing dividend checks or communicating with the company which issued the stock within a seven-year period. Underlying shares, regardless of when issued, shall be considered subject to this subchapter.

* * * *

18-28-209. Miscellaneous personal property held for another person.

All intangible personal property, not otherwise covered by this subchapter, including any income or increment thereon and deducting any lawful charges, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven (7) years after it became payable or distributable is presumed abandoned.

* * * *

18-28-211. Report of abandoned property.

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this

subchapter shall report to the Auditor of State with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) Except with respect to traveler's checks and money orders the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of one hundred dollars ($100) or more presumed abandoned under this subchapter;

(2) In the case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(3) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under one hundred dollars ($100) each may be reported in aggregate;

(4) The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) Other information which the Auditor of State prescribes by rule as necessary for the administration of this subchapter.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before November 1 of each year as of June 30 of the same year. The Auditor of State may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this subchapter knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder, before filing the annual report, shall communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and, if made by a public corporation, by its chief fiscal officer.

* * * *

18-28-213. Payment or delivery of abandoned property.

Every person who has filed a report under § 18-28-211 within twenty (20) days after the time specified in § 18-28-212 for claiming the property from the holder, or in the case of sums payable on traveler's checks or money orders presumed abandoned under § 18-28-202 within twenty (20) days after the filing of the report, shall pay or deliver to the Auditor of State all abandoned property specified in this report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in § 18-28-212, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the Auditor of State, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

FLORIDA

Fla. Stat. Ann. §§ 717.101 to 717.119 (West 1988)

717.101. Definitions.

As used in this chapter, unless the context otherwise requires:

(1) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

* * * *

(3) "Business association" means any corporation (other than a public corporation), joint stock company, investment company, business trust, partnership, or association for business purposes of two or more individuals, whether or not for profit, including a banking organization, financial organization, insurance company, or utility.

(4) "Department" means the Department of Banking and Finance.

(5) "Domicile" means the state of incorporation, in the case of a corporation incorporated under the laws of a state, and the state of the principal place of business, in the case of a person not incorporated under the laws of a state.

* * * *

(7) "Holder" means a person, wherever organized or domiciled, who is:

(a) In possession of property belonging to another;

(b) A trustee in case of a trust; or

(c) Indebted to another on an obligation.

* * * *

(9) "Intangible property" includes, by way of illustration and not limitation:

(a) Moneys, checks, drafts, deposits, interest, dividends, and income.

(b) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances.

(c) Stocks, and other intangible ownership interests in business associations.

(d) Moneys deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions.

(e) Amounts due and payable under the terms of insurance policies.

(f) Amounts distributable from a trust or custodial fund established under a plan to provide any health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefit.

(10) "Last known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

(11) "Owner" means a depositor in the case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, a claimant, or a payee in the case of other intangible property, or a person having a legal or equitable interest in property subject to this chapter or his legal representative.

(12) "Reportable period" means the fiscal year ending June 30 of each year, except for life insurance companies where reportable period means the calendar year ending December 31. Except as in the case of life insurance companies, the first unclaimed property reportable under this chapter shall be for the fiscal year beginning July 1, 1987, and ending June 30, 1988, and the report due under this chapter shall be filed no later than November 1, 1988. In

the case of life insurance companies, the first unclaimed property reportable under this chapter shall be for the calendar year beginning January 1, 1988, and ending December 31, 1988, and the report due under this chapter shall be filed no later than May 1, 1989.

(13) "State," when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession, and any other area subject to the legislative authority of the United States.

* * * *

717.102. Property presumed abandoned; general rule.

(1) All intangible property, including any income or increment thereon less any lawful charges, that is held, issued, or owing in the ordinary course of the holder's business and has remained unclaimed by the owner for more than 5 years after it becomes payable or distributable is presumed abandoned, except as otherwise provided by this chapter.

(2) Property is payable or distributable for the purpose of this chapter notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

717.103. General rules for taking custody of intangible unclaimed property.

Unless otherwise provided in this chapter or by other statute of this state, intangible property is subject to the custody of the department as unclaimed property if the conditions leading to a presumption of abandonment as described in s. 717.102 and ss. 717.105-717.116 are satisfied and:

(1) The last known address, as shown on the records of the holder, of the apparent owner is in this state;

(2) The records of the holder do not reflect the identity of the person entitled to the property, and it is estab-

lished that the last known address of the person entitled to the property is in this state;

(3) The records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(a) The last known address of the person entitled to the property is in this state; or

(b) The holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) The last known address, as shown on the records of the holder, of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property, or its escheat or unclaimed property law is not applicable to the property, and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

(5) The last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this state; or

(6) The transaction out of which the property arose occurred in this state, and;

(a)1. The last known address of the apparent owner or other person entitled to the property is unknown; or

2. The last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property, or its escheat or unclaimed property law is not applicable to the property; and

(b) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property, or its escheat or unclaimed property law is not applicable to the property.

* * * *

717.1101. Stock and other intangible interests in business associations.

(1) Except as provided in subsections (2) and (5), any stock or other intangible ownership interest in a business association, the existence of which is evidenced by record available to the association, is presumed abandoned and, with respect to the interest, the association is the holder, if a dividend, distribution, or other sum payable as a result of the interest has for 7 years remained unclaimed by the owner and the owner has not within 7 years:

(a) Communicated in writing with the association or its agent regarding the interest or a dividend, distribution, or other sum payable as a result of the interest; or

(b) Otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association or its agent prepared by an employee of the association or its agent.

(2) At the expiration of a 7-year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest shall not be presumed abandoned unless there have been at least seven dividends, distributions, or other sums paid during the period, none of which has been claimed. If seven dividends, distributions, or other sums are paid during the 7-year period, the period leading to a presumption of abandonment commences on the date payment of the first such unclaimed dividend, dis-

tribution, or other sum became due and payable. If seven dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been seven dividends, distributions, or other sums that have not been claimed by the owner.

(3) The running of the 7-year period of abandonment ceases immediately upon the occurrence of one or more of the conditions referred to in subsection (1). If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back only to the time a subsequent dividend, distribution, or other sum became due and payable.

(4) At the same time any interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously presumed abandoned, is presumed abandoned.

(5) This chapter shall not apply to any stock or other intangible ownership interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the interest unless the records available to the administrator of the plan show, with respect to any intangible ownership interest not enrolled in the reinvestment plan, that the owner has not within 7 years satisfied any of the conditions referred to in subsection (1).

* * * *

717.117. Report of abandoned property.

(1) Every person holding funds or other property, tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this chapter shall report to the department with respect to the property as provided in this section.

(2) The report shall be verified. Verification of a private corporation or unincorporated association shall be made by an officer; of a partnership, by a partner; and of a public corporation, by its chief fiscal officer. The report must include:

(a) Except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of a value of $25 or more presumed abandoned under this chapter.

(b) In the case of unclaimed funds of $25 or more held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to records of the insurance company holding or owing the funds.

(c) In the case of the contents of a safe deposit box or other safekeeping repository or in the case of other tangible property, a description of the property and the place where it is held and may be inspected by the department, and any amounts owing to the holder.

(d) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items of value under $25 each may be reported in the aggregate.

(e) The date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property.

(f) Other information which the department prescribes by rule as necessary for the administration of this chapter.

(3) If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the prop-

erty for the apparent owner or the holder has changed his name while holding the property, he shall file with his report all known names and addresses of each previous holder of the property.

(4) The report must be filed before November 1 of each year as of June 30, next preceding, but the report of any life insurance company must be filed before May 1 of each year as of December 31, next preceding. If such report is not filed on or before the applicable filing date, the holder shall pay to the department a penalty of $10 per day for each day the report is delinquent, but such penalty shall not exceed $500. As necessary for proper administration of this chapter, the department may waive any penalty due with appropriate justification. On written request by any person required to file a report, the department may postpone the reporting date.

(5) Not more than 120 days prior to filing the report required by this section, the holder in possession of property presumed abandoned and subject to custody as unclaimed property under this chapter shall send written notice to the apparent owner at his last known address informing him that the holder is in possession of property subject to this chapter if:

(a) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate.

(b) The claim of the apparent owner is not barred by the statute of limitations.

(6) Any holder of intangible property may file with the department a petition for determination that the property is abandoned requesting the department to accept custody of the property. The petition shall state any special circumstances that exist, contain the information required by subsection (2), and show that a diligent search has been made to locate the owner. If the depart-

ment finds that the proof of diligent search is satisfactory, it shall give notice as provided in s. 717.118 and accept custody of the property.

* * * *

717.119. Payment or delivery of abandoned property.

(1) Except as otherwise provided in subsections (2) and (3), every person who is required to file a report under s. 717.117 shall, within 6 months after the final date for filing the report as required by s. 717.117, pay or deliver to the department all abandoned property required to be reported.

(2) If the owner establishes the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the department, which will no longer be presumed abandoned, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(3) Property reported under s. 717.117 for which the holder is not required to report the name of the apparent owner must be delivered to the department at the time of filing the report.

(4) The holder of any interest under s. 717.1101 shall deliver a duplicate certificate, or other evidence of ownership if the holder does not issue certificates of ownership, to the department. Upon delivery of a duplicate certificate to the department, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provisions of s. 717.1201 to every person, including any person acquiring the original certificate or the duplicate of the certificates issued to the department,

for any losses or damages resulting to the person by the issuance and delivery to the department of the duplicate certificate.

(5) Any holder may request an extension in writing of up to 60 days for the delivery of property if extenuating circumstances exist for the late delivery of the property, and the department may grant such an extension in writing.

IOWA

Iowa Code Ann. §§ 556.1 to 556.13 (West Supp. 1989)

556.1. Definitions and use of terms.

As used in this chapter, unless the context otherwise requires:

* * * *

2. "Business association" means any corporation other than a public corporation, joint stock company, business trust, partnership, or any association for business purposes of two or more individuals.

* * * *

4. "Holder" means any person in possession of property subject to this chapter belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this chapter.

* * * *

6. "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this chapter, or his legal representative.

7. "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

* * * *

556.5. Stocks and other intangible interests in business associations

1. Except as provided in subsections 2 and 5, stock or other intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, is presumed abandoned and, with

respect to the interest, the association is the holder, if a dividend, distribution, or other sum payable as a result of the interest has remained unclaimed by the owner for seven years and the owner within seven years has not:

a. Communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest.

b. Otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association prepared by an employee of the association.

2. At the expiration of a seven-year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least seven dividends, distributions, or other sums paid during the period, none of which has been claimed by the owner. If seven dividends, distributions, or other sums are paid during the seven-year period, the period leading to a presumption of abandonment commences on the date payment of the first unclaimed dividend, distribution, or other sum became due and payable. If seven dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been seven dividends, distributions, or other sums that have not been claimed by the owner.

3. The running of the seven-year period of abandonment ceases immediately upon the occurrence of a communication referred to in subsection 1. If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back to the time a subsequent dividend, distribution, or other sum became due and payable.

4. At the time an interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously abandoned, is presumed abandoned.

5. This section does not apply to any stock or other intangible ownership of interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or other sums payable as a result of the interest unless the records available to the treasurer of state show, with respect to any intangible ownership interest not enrolled in the reinvestment plan, that the owner has not within seven years communicated in any manner described in subsection 1.

6. Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within five years after the date prescribed for payment or delivery, is presumed abandoned.

* * * *

556.9. Miscellaneous personal property held for another person.

All intangible personal property, not otherwise covered by this chapter, including any income or increment thereon and deducting any lawful charges, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than three years after it became payable or distributable is presumed abandoned.

* * * *

556.11. Report of abandoned property.

1. Every person holding funds or other property, tangible or intangible, presumed abandoned under this chapter shall report to the state treasurer with respect to the property as hereinafter provided.

2. The report shall be verified and shall include:

a. Except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of twenty-five dollars or more presumed abandoned under this chapter.

b. In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and the insured's or annuitant's last known address according to the life insurance corporation's records.

c. The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under twenty-five dollars each may be reported in aggregate.

d. The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property.

e. Other information which the state treasurer prescribes by rule as necessary for the administration of this chapter.

3. If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed names while holding the property, the holder shall file with the holder's report all prior known names and addresses of each holder of the property.

4. The report shall be filed before November 1 of each year as of June 30 next preceding, but the report of life

insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. The state treasurer may postpone the reporting date upon written request by any person required to file a report.

5. If the holder of property presumed abandoned under this chapter knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

6. Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

7. The initial report filed under this chapter shall include all items of property that would have been presumed abandoned if this chapter had been in effect during the ten-year period preceding its effective date.

* * * *

* * * *

556.13. Payment or delivery of abandoned property.

Every person who has filed a report under section 556.11, within twenty days after the time specified in section 556.12 for claiming the property from the holder, or in the case of sums payable on traveler's checks or money orders presumed abandoned under section 556.2 or property for which the holder is not required to report the name of the owner shall, at the time of filing the report, pay or deliver to the treasurer of state all abandoned property specified in this report, except that, if the owner establishes the owner's right to receive the abandoned property to the satisfaction of the holder within

the time specified in section 556.12, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the treasurer of state, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

MISSISSIPPI

Miss. Code Ann. §§ 89-12-3 to 89-12-29 (Supp. 1989)

§ 89-12-3. Definitions.

As used in this chapter, unless the context otherwise requires:

* * * *

(b) "Business association" means any corporation, joint stock company, business trust, partnership, or any association for business purposes of two (2) or more individuals, whether organized for profit or nonprofit, including, but not limited to, a banking organization, financial organization, life insurance corporation and utility.

* * * *

(d) "Holder" means any person in possession of property subject to the provisions of this act belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to the provisions of this chapter.

* * * *

(f) "Intangible personal property" means:

(i) Monies, checks, drafts, deposits, interest, dividends, and income;

(ii) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;

(iii) Monies deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;

(iv) Amounts due and payable under the terms of insurance policies; and

(v) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

"Intangible personal property" shall not include stocks and other intangible ownership interests in business associations.

(g) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to the provisions of this act, or his legal representative.

(h) "Apparent owner" means the person who appears from the records of the holder to be entitled to property held by the holder.

(i) "Person" means any individual, business association, government or political subdivision or agency other than the United States government or any officer, department or agency thereof, corporation, public authority, estate, trust, two (2) or more persons having a joint or common interest, or any other legal or commercial entity whether such person is acting in his own right or in a representative capacity.

(j) "Treasurer" means the state treasurer of the State of Mississippi.

* * * *

§ 89-12-11. Presumed abandonment of dividend, interest and the like held or owing by business association for or to shareholder, bondholder and the like.

Subject to the provisions of section 89-12-17, any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bond-

holder, or other security holder, or a participating patron of a cooperative, who has not claimed it or corresponded in writing with the business association concerning it within seven (7) years after the date prescribed for payment or delivery, shall be presumed abandoned. However, the property presumed abandoned under this chapter shall not include capital credits or patronage refunds offered for payment by nonprofit cooperative electric power associations or nonprofit cooperative water and sewer associations, but rather such unclaimed funds shall be used for the benefit of the general membership of such associations.

* * * *

§ 89-12-15. Presumed abandonment of intangible personal property held in ordinary course of holder's business.

All intangible personal property not otherwise covered by the provisions of this chapter, including any income or increment thereon and deducting any charges that may have accrued, that is held in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven (7) years after it became payable or distributable shall be presumed abandoned.

§ 89-12-17. Additional conditions for presumption of abandonment of intangible personal property.

Unless otherwise provided by statute of this state, intangible personal property shall be presumed abandoned under the provisions of this chapter if the conditions for presumption of abandonment stated in the provisions of this chapter exist, and if:

(a) The last-known address of the apparent owner is in this state as shown on the records of the holder; or

(b) No address of the apparent owner appears on the records of the holder, and

(i) The last-known address of the apparent owner is in this state, or

(ii) The holder is domiciled in this state and has not previously paid the property to the state of the last-known address of the apparent owner, or

(iii) The holder is a government or governmental subdivision or agency of this state and has not previously paid the property to the state of the last-known address of the apparent owner; or

(c) The last-known address of the apparent owner, as shown on the records of the holder, is in a state designated by regulation adopted by the treasurer as a state that does not provide by law for presumption of abandonment or escheat of such property and the holder is

(i) Domiciled in this state, or

(ii) A government or governmental subdivision or agency of this state; or

(d) The last-known address of the apparent owner, as shown on the records of the holder, is in a foreign nation and the holder is

(i) Domiciled in the state, or

(ii) A government or governmental subdivision or agency of this state.

* * * *

§ 89-12-23. Report to treasurer by holder of property presumed abandoned.

(1) Every person holding funds or other intangible personal property presumed abandoned under the provisions of this chapter shall report to the treasurer with respect to the property as hereinafter provided.

(2) The report shall be verified, shall be on a form prescribed or approved by the treasurer, and shall include:

(a) Except with respect to traveler's checks and money orders, the name, if known, and last-known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of more than one hundred dollars ($100.00) presumed abandoned under the provisions of this chapter;

(b) In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(c) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under one hundred dollars ($100.00) each may be reported in aggregate;

(d) Except for any property reported in the aggregate, the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(e) Other information which the treasurer prescribes by regulation as necessary for the administration of this chapter.

(3) If the person holding property presumed abandoned under the provisions of this chapter is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior-known names and addresses of each holder of the property.

(4) The report shall be filed annually through 1984, or for life insurance corporations, through 1985, and reports shall be filed every third year thereafter. The report shall be filed before November 1 of each year in which a report is required as of June 30 next preceding, but the report of life insurance corporations shall be filed before May 1

of each year in which a report is required as of December 31 next preceding. The Treasurer may postpone the reporting date upon written request by any person required to file a report.

(5) If the holder of property presumed abandoned under the provisions of this chapter knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the required report, endeavor to communicate with the owner and take reasonable steps to prevent abandonment from being presumed. The mailing of notice to the last-known address of the owner by the holder shall constitute compliance with this subsection and no further act on the part of the holder shall be necessary.

(6) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(7) Every person who is requested in writing by the treasurer shall file a report stating that such person is not holding any abandoned property which is reportable pursuant to the provisions of this section.

(8) The initial report filed under this chapter shall include all items of property that would have been presumed abandoned if this chapter had been in effect since July 1, 1969, and all such property shall be subject to the provisions of this chapter.

* * * *

§ 89-12-29. Payment or delivery of abandoned property to treasurer.

Every person who has filed a report under the provisions of section 89-12-23 shall, within twenty (20) days after the time specified in section 89-12-27 for claiming the property from the holder, or, in the case of sums pay-

able on traveler's checks or money orders presumed abandoned under the provisions of section 89-12-5 or any other property reported pursuant to the provisions of section 89-12-23 without the name of the owner, at the time of filing the report, pay or deliver to the treasurer all abandoned property specified in the report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section 89-12-27 or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the treasurer, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

MISSOURI

Mo. Ann. Stat. §§ 447.503 to 447.543 (Vernon 1986 & Supp. 1989) by Mo. House Bill No. 506, 85th General Assembly (effective August 28, 1989)

447.503. Definitions.

As used in sections 447.500 to 447.585, unless the context otherwise requires:

* * * *

(2) "Business association" means any corporation, joint stock company, business trust, partnership, limited partnership, or any association for business purposes, or any mutual fund or other similar entity, whether operating in the form of a corporation or a trust, including but not limited to any investment companies registered under the federal Investment Company Act of 1940;

(3) "Director" means the director of the department of consumer affairs, regulation and licensing;

* * * *

(5) "Holder" means any person in possession of property subject to sections 447.500 to 447.585, belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to sections 447.500 to 447.585;

* * * *

(7) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust except a trust defined in section 456.500, RSMo, the unclaimed property of which has not escheated pursuant to the provisions of section 456.650, RSMo, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to sections 447.500 to 447.585, or his legal representative;

(8) "Person" means any individual, business association, government or political subdivision, public corpora-

tion, public authority, estate, trust except a trust defined in section 456.500, RSMo, two or more persons having a joint or common interest, or any other legal or commercial entity;

(9) "Treasurer" means the Missouri state treasurer;

* * * *

447.520. Stock, certificates of ownership—dividend profit —distribution or interest payment, held or owing by business association presumed abandoned, when

1. Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it within seven years after the date prescribed for payment or delivery, is presumed abandoned if:

(1) It is held or owing by a business association organized under the laws of or created in this state; or

(2) It is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state.

2. Any intangible interest in a business association, as evidenced by the stock records or membership records of the association, is presumed abandoned if:

(1) The interest in the association is owned by a person who for more than seven years has neither claimed a dividend or other sum nor corresponded in writing with the association or otherwise indicated an interest as evidenced by a memorandum or other record on file with the association; and

(2) The association does not know the location of the owner at the end of such seven-year period. With respect to such interest, the business association shall be deemed the holder.

3. Any dividend or other distribution held for or owing to a person at the time the stock or other security to which such dividend or other distribution attaches, is considered abandoned at the same time.

* * * *

447.535. All other intangible property presumed abandoned, when

All intangible personal property, not otherwise covered by sections 447.500 to 447.585, including any income or increment thereon, and deducting any lawful charges, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven years after it became payable or distributable is presumed abandoned. Intangible personal property where the property is held in a jurisdiction in which the abandonment presumption is less than seven years shall be accepted by the state of Missouri.

* * * *

447.539. Report to Director on property presumed abandoned—content—filed, when extension of filing time—location of owner, duties.

1. Every person holding funds or other property, tangible or intangible, presumed abandoned under sections 447.500 to 447.585 shall report to the director with respect to the abandoned property as provided in this section.

2. The report shall be verified by the person filing the report and shall include:

(1) The name, if known, and last known address, if any, of each person appearing from the records of the

holder to be the owner of any property of the value of fifty dollars or more presumed abandoned under sections 447.500 to 447.585;

(2) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under fifty dollars each may be reported in aggregate;

(3) The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(4) Other information under the control of the holder which the director prescribes by rule as necessary for the administration of sections 447.500 to 447.585. However, the director shall not request a history of fees and charges on the property in question for information prior to the cut-off date for reporting. Should the case be referred to the attorney general for legal action, he may examine records that are retained under the authority of the entities record retention law.

3. If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

4. Except for the year ending June 30, 1984, the report shall be filed before November first of each year as of June thirtieth next preceding, but the report of life insurance corporations shall be filed before May first of each year as of December thirty-first next preceding. The report for the year ending June 30, 1984, may be combined with the report for the year ending June 30, 1985, and may be included in the report due on November 1, 1985. The director may extend the reporting deadline for a period of not more than thirty days upon written request by any person required to file a report.

5. If the holder of property presumed abandoned under sections 447.500 to 447.585 knows the whereabouts of the owner, if the owner's claim has not been barred by the statute of limitations, and the property involved is valued at fifty dollars or more the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise such reasonable and necessary diligence as is consistent with good business practice to ascertain the whereabouts of such owner of property valued at fifty dollars or more.

6. Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or corporation, by an officer.

* * * *

447.543. Delivery of property to director, when—retention of approved costs—errors of presumption, procedure—abandoned fund account established —payment of claims.

1. Every person who has filed a report under section 447.539 shall pay all moneys to the treasurer and deliver to the director all other abandoned property specified in the report at the time of filing the report, provided the holder may retain from any such moneys the reasonable costs of complying with sections 447.500 to 447.585, which costs shall be approved by the director. The director shall approve such costs provided such costs are not unreasonable given the facts and circumstances of each case. The holder may recover the total bona fide costs for compliance with sections 447.500 to 447.585. If the owner establishes his right to receive the abandoned property to the satisfaction of the holder before such report is filed, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property as required in this subsection, which will no longer be presumed abandoned, but in lieu thereof shall file a verified written explanation of the proof of

claim or of the error in the presumption of abandonment with the director.

2. The treasurer shall record the name and the last known address of each person appearing from the holders' reports to be entitled to the abandoned funds and cause such funds to be deposited in the special account known as the "Abandoned Fund Account", which is hereby created. The abandoned fund account created by this section shall be the successor-account to the abandoned fund account previously in the state treasury and all funds in such accounts on August 13, 1984, shall be transferred to the abandoned fund account created by this section. Records made herein shall be available for public inspection at all reasonable business hours; exept [sic] that, the records shall not be subject to public inspection or available for copying, reproduction, or scrutiny by commercial or professional locators of property presumed abandoned who charge any service or finder's fee until ninety days after the names of the people to whom property is owed have been published or officially disclosed. From this account the treasurer shall make prompt payment of claims duly allowed by the director as hereinafter provided. At any time when the balance of the account exceeds fifty thousand dollars, the treasurer may, and at least once every fiscal year shall, transfer to the general revenue of the state of Missouri the balance of the abandoned fund account which shall exceed fifty thousand dollars. Should any claims be allowed or refunds ordered which reduce the balance to less than twenty-five thousand dollars, the treasurer shall transfer from the general funds of the state an amount which is sufficient to restore the balance to fifty thousand dollars.

NEW HAMPSHIRE

N.H. Rev. Stat. Ann. §§ 471-C:1 to 471-C:21 (Supp. 1988)

471-C:1. Definitions.

As used in this chapter, unless the context otherwise requires:

I. "Administrator" means the state treasurer.

II. "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

* * * *

V. "Business association" means a non-public corporation, joint stock company, investment company, business trust, partnership, or association for business purposes of 2 or more individuals, whether or not for profit, including a banking organization, financial organization, insurance company, or utility.

VI. "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of an incorporated person.

VII. "Escheat", except in RSA 471-C:30, means the presumption of abandonment of property followed by:

(a) Immediate proceedings for the taking of title; or

(b) The required delivery to the state followed by immediate proceedings for the taking of title; or

(c) Completion of proceedings in RSA 471-C:30 followed by payment or delivery of property to the appropriate county treasurer.

* * * *

IX. "Holder" means a person, wherever organized or domiciled, who is:

(a) In possession of property belonging to another;

(b) A trustee; or

(c) Indebted to another on an obligation.

* * * *

XI. "Intangible property" includes:

(a) Moneys, checks, drafts, deposits, interest, dividends, and income;

(b) Credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;

(c) Stocks and other intangible ownership interests in business associations;

(d) Moneys deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;

(e) Amounts due and payable under the terms of insurance policies, except amounts due under claims instruments which require acceptance by the claimant or which, by their terms, are void if not presented within a definite time; and

(f) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

XII. "Last known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

XIII. "Owner" means a depositor in the case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, claimant, or payee in the case of other intangible property, or a person having a legal

or equitable interest in property subject to this chapter or his legal representative.

XIV. "Person" means an individual, business association, state or other government, governmental subdivision or agency, public authority, estate, trust, 2 or more persons having a joint or common interest, or any other legal or commercial entity.

XV. "State" means any state, district, commonwealth, territory, insular possession, or any other area subject to the legislative authority of the United States.

* * * *

471-C:2. Property Presumed Abandoned.

I. Except as otherwise provided in this chapter, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than 7 years after it became payable or distributable is presumed abandoned.

II. Property is payable or distributable for the purpose of this chapter notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

471-C:3. General Conditions Precedent to Presumption of Abandonment.

Unless otherwise provided, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under RSA 471-C:2 or RSA 471-C:5-18 are satisfied and: [Amended 1988, 256:1, eff. June 29, 1988.]

I. The last known address, as shown on the records of the holder, of the apparent owner is in this state;

II. The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this state;

III. The records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(a) The last known address of the person entitled to the property is in this state; or

(b) The holder is a domiciliary or a government or governmental subdivision or agency of this state and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

IV. The last known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property and the holder is a domiciliary or a government or governmental subdivision or agency of this state;

V. The last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this state; or

VI. The transaction out of which the property arose occurred in this state; and

(a) The last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and

(b) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of

the property or its escheat or unclaimed property law is not applicable to the property.

* * * *

471-C:10. Stock and Other Intangible Interests in Business Associations.

I. Except as provided in paragraphs II and V, stock or other intangible ownership interest in a business association, the existence of which is evidenced by records available to the association, is presumed abandoned and, with respect to the interest, the association is the holder, if a dividend, distribution, or other sum payable as a result of the interest has remained unclaimed by the owner for 7 years and the owner within 7 years has not:

(a) Communicated in writing with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest; or

(b) Otherwise communicated with the association regarding the interest or a dividend, distribution, or other sum payable as a result of the interest, as evidenced by a memorandum or other record on file with the association prepared by an employee of the association.

II. At the expiration of a 7-year period following the failure of the owner to claim a dividend, distribution, or other sum payable to the owner as a result of the interest, the interest is not presumed abandoned unless there have been at least 7 dividends, distributions, or other sums paid during the period, none of which has been claimed by the owner. If 7 dividends, distributions, or other sums are paid during the 7-year period, the period leading to a presumption of abandonment commences on the date payment of the first such unclaimed dividend, distribution, or other sum became due and payable. If 7 dividends, distributions, or other sums are not paid during the presumptive period, the period continues to run until there have been 7 dividends, distributions, or other sums that have not been claimed by the owner.

III. The running of the 7-year period of abandonment ceases immediately upon the occurrence of a communication referred to in paragraph I. If any future dividend, distribution, or other sum payable to the owner as a result of the interest is subsequently not claimed by the owner, a new period of abandonment commences and relates back to the time a subsequent dividend, distribution, or other sum became due and payable.

IV. At the time an interest is presumed abandoned under this section, any dividend, distribution, or other sum then held for or owing to the owner as a result of the interest, and not previously presumed abandoned, is presumed abandoned.

V. This chapter does not apply to any stock or other intangible ownership interest enrolled in a plan that provides for the automatic reinvestment of dividends, distributions, or sums payable as a result of the interest unless the records available to the administrator of the plan show, with respect to any intangible ownership interest not enrolled in the reinvestment plan, that the owner has not within 7 years communicated in any manner described in paragraph I.

* * * *

471-C:19. Report of Abandoned Property.

I. A person holding property, tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this chapter shall report to the administrator concerning the property as provided in this section.

II. The report must be verified and shall include:

(a) Except with respect to travelers checks and money orders, tne name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of property of the value of $25 or more presumed abandoned under this chapter;

(b) In the case of the unclaimed funds of $25 or more held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the funds;

(c) In the case of the contents of a safe deposit box or other safekeeping repository or of other tangible property, a description of the property and the place where it is held and may be inspected by the administrator and any amounts owing to the holder;

(d) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items of value under $25 each may be reported in the aggregate;

(e) The date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(f) Other information the administrator prescribes by rules adopted, pursuant to RSA 541-A, relative to the administration of this chapter.

III. If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the property for the apparent owner or the holder has changed his name while holding the property, he shall file with his report all known names and addresses of each previous holder of the property.

IV. The report shall be filed before November 1 of each year for property presumed to be abandoned as of June 30 of that year, but the report of any life insurance company shall be filed before May 1 of each year for funds owing under life insurance policies presumed to be abandoned as of December 31 of the preceding year. On

written request by any person required to file a report, the administrator may postpone the reporting date.

V. Not more than 120 days before filing the report required by this section, the holder in possession of property abandoned and subject to custody as unclaimed property under this chapter shall send written notice to the apparent owner at his last known address informing him that the holder is in possession of property subject to this chapter if:

(a) The holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate;

(b) The claim of the apparent owner is not barred by the statute of limitations; and

(c) The property has a value of $25 or more.

• • • •

471-C:21. Payment or Delivery of Abandoned Property.

I. Except as otherwise provided in paragraphs iI and III, a person who is required to file a report under RSA 471-C:19, within 6 months after the final date for filing the report as required by RSA 471-C:19, shall pay or deliver to the administrator all abandoned property required to be reported.

II. If the owner established the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or it appears that for some reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the administrator, and the property shall no longer be presumed abandoned. In that case, the holder shall file with the administrator a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

III. Property reported under RSA 471-C:19 for which the holder is not required to report the name of the apparent owner must be delivered to the administrator at the time of filing the report.

IV. The holder of an interest under RSA 471-C:10 shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificates of ownership to the administrator. Upon delivery of a duplicate certificate to the administrator, the holder and any transfer agent, registrar, or other person acting for or on behalf of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provisions of RSA 471-C:22 to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the administrator, for any losses or damages resulting to any person by the issuance and delivery to the administrator of the duplicate certificate.

WEST VIRGINIA

W.Va. Code §§ 36-8-1 to 36-8-13 (1985)

§ 36-8-1. Definitions and use of terms.

As used in this article, unless the context otherwise requires:

* * * *

(b) "Business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals.

* * * *

(d) "Holder" means any person in possession of property subject to this article belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this article.

* * * *

(f) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this article, or his legal representative.

(g) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity; but shall not include any retirement system supported entirely or in part by the State of West Virginia.

* * * *

§ 36-8-5. Undistributed dividends and distributions of business associations.

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business associa-

tion for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within seven years after the date prescribed for payment or delivery, is presumed abandoned if:

(a) It is held or owing by a business association organized under the laws of or created in this State; or

(b) It is held or owing by a business association doing business in this State, but not organized under the laws of or created in this State, and the records of the business association indicate that the last-known address of the person entitled thereto is in this State.

* * * *

§ 36-8-9. Miscellaneous personal property held for another person; exception; prohibiting the levying of charges on inactive savings accounts.

All personal property not otherwise covered by this article, including any income or increment thereon and after deducting any lawful charges, that is held or owing in this State in the ordinary course of the holder's business and has remained unclaimed by the owner for more than seven years after it became payable or distributable is presumed abandoned: Provided, that this section shall not apply to such property held or owing by a utility prior to one thousand nine hundred fifty-seven: Provided, however, that notwithstanding the provisions of section two [§ 36-8-2] of this article, no banking or other financial organization or institution shall, after the effective date of this section [June 6, 1984], demand, collect, charge or contract to receive any charge due to dormancy or inactivity on any interest bearing savings or time deposit for any period of time prior to the withdrawal of such funds by the depositor, his personal agent or representative, or the accrual under this article of the right

of the State to deposit or sell as abandoned property any such deposit. For purposes of this proviso, any interest bearing savings or time deposit shall be deemed to be dormant or inactive if the depositor, his personal agent or representative has not within the immediately preceding two years increased or decreased the amount of the deposit.

* * * * *

§ 36-8-11. Report of abandoned property.

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this article shall report to the State treasurer with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) The name, if known, and last-known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of fifty dollars or more presumed abandoned under this article;

(2) In case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last-known address according to the life insurance corporation's records;

(3) The nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under fifty dollars each may be reported in aggregate;

(4) The date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) Other information which the State treasurer prescribes by rule as necessary for the administration of this article.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the

property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before November first of each year as of June thirtieth next preceding, but the report of life insurance corporations shall be filed before May first of each year as of December thirty-first next preceding. The State treasurer may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this article knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, attempt to communicate with the owner so that the owner may take necessary steps to prevent abandonment from being presumed. A notice from the holder to the owner sent to the owner's last-known address by United States mail, postage prepaid, shall satisfy the requirements of this subsection (e).

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer, and if made by a public corporation, by its chief fiscal officer.

(g) The initial report filed under this article shall include all items of property which, under the provisions hereof, would have been presumed abandoned on the effective date of this article [July 1, 1967] had this article been in effect on July one, one thousand nine hundred fifty-two.

(h) The State treasurer may at reasonable times and upon reasonable notice examine the records of any person if he has reason to believe that the person has failed to report property that should have been reported pursuant to this section.

If an examination of the records of a person results in disclosure of property reportable and deliverable under this section, the treasurer may assess the cost of the examination against the holder at a rate established by administrative regulation promulgated pursuant to chapter twenty-nine-A [§ 29A-1-1 et seq.] of this code, but in no case may the charges exceed the value of the property found to be reportable and deliverable.

* * * *

§ 36-8-13. Payment or delivery of abandoned property.

Every person who has filed a report as provided by section eleven [§ 36-8-11] shall within twenty-five days after the time specified in section twelve [§ 36-8-12] for claiming the property from the holder pay or deliver to the State treasurer all abandoned property specified in the report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section twelve, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the State treasurer, but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

MOTION FILED
NOV 17 1989

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
v.
STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan and Ohio

JOHN K. VAN DE KAMP
Attorney General of California
ANDREA S. ORDIN, Chief Assistant Attorney General
CAROLE R. KORNBLUM
Assistant Attorney General
YEORYIOS C. APALLAS*
Deputy Attorney General
350 McAllister Street, 6000
San Francisco, CA 94102
(415) 557-4100

Attorneys for the State of California

*Counsel of Record

November 17, 1989

[Additional Counsel Listed on Inside Cover]

40 pp

ADDITIONAL COUNSEL

FRANK J. KELLEY
Attorney General
ANDREW QUINN
Assistant Attorney General
and State Public
Administrator
401 S. Washington Square
Plaza One Building, 3rd Floor
Lansing, Michigan 48913
(517) 373-1145

Attorneys for the State of Michigan

ANTHONY J.
CELEBREZZE, JR.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

Attorney for State of Ohio

ROBERT M. SPIRE
Attorney General of Nebraska
DALE A. COMER*
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

Attorneys for the State of Nebraska

JAMES E. O'NEIL
Attorney General of Rhode Island
NICHOLAS TROTT LONG
Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

Attorneys for Anthony J. Solomon, General Treasurer of Rhode Island

*Counsel of Record

TABLE OF CONTENTS

	Page
MOTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO AND RHODE ISLAND FOR LEAVE TO FILE COMPLAINT IN INTERVENTION	1
COMPLAINT IN INTERVENTION	7
EXHIBIT A	16
BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION	17
CERTIFICATE OF SERVICE	27

No. 111 Original

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO AND RHODE ISLAND FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the States of California, Michigan, Nebraska, Ohio,

and Rhode Island, sovereign states of the United States of America, by and through the State Officials listed below and undersigned counsel, move the Court for an order permitting them to intervene as Plaintiffs in the above-entitled cause and permitting their proposed Complaint in Intervention, attached hereto, to be filed in this action. In support of this Motion, the States of California, Michigan, Nebraska, Ohio, and Rhode Island (hereinafter "Designated States") would show the Court as follows:

1. On or about May 31, 1988, the Court granted the Motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of moneys and other intangible property ("Excess Receipts"), held by securities brokerage houses incorporated in Delaware.

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master in this case.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. Texas claimed a right to possession of certain of the unclaimed property also claimed by New York and Delaware. Texas has introduced into this litigation the related issue of which state is entitled to claim and take possession of other intangible personal property held by clearinghouses for the settlement of trades in securities, and unclaimed principal and interest payments on state and municipal obligations

("Additional Excess Receipts").[1]

4. As specifically and particularly set forth in the attached proposed Complaint in Intervention, the Designated States claim a portion of the Excess Receipts and the Additional Excess Receipts (collectively "Unclaimed Funds") which constitute the unclaimed property that is the subject matter of this controversy. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount").

5. The amount of Unclaimed Funds in issue in this litigation that the Designated States are entitled to claim is presently unknown, but, upon information and belief, is substantial.

6. The decision of the Court in this action will conclusively determine the right of the Designated States to claim and take possession of these Unclaimed Funds. If the position of either Delaware or New York or Texas is accepted, the Designated States may be forever precluded from taking possession of the unclaimed property as to which there are conflicting claims. Because Delaware, New York and the Designated States each asserts conflicting claims to the subject Unclaimed Funds, the interests of the Designated States are not adequately represented by the existing parties.

---

1. These terms are defined in the accompanying Complaint in Intervention.

7. The Motion of the Designated States is timely because the litigation is still at an early stage. The Special Master issued an order effective October 18, 1989, providing that prospective intervenors filing motions for leave to intervene within thirty days of that date will join the same scheduling track as presently participating parties. Thus the proceedings will not be delayed by the granting of this motion.

8. The intervention of the Designated States will aid in the resolution of the factual and legal issues presented by this litigation.

9. The intervention of the Designated States will allow the various positions of the states to be resolved in a single proceeding, avoiding a multiplicity of lawsuits.

10. Based on the foregoing, and the arguments set forth in the attached Brief in support of this Motion, the Designated States are entitled to intervene as a matter of right pursuant to Rule 24(a)(2), or, in the alternative, in the exercise of the Court's discretion pursuant to Rule 24(b), Federal Rules of Civil Procedure.

THEREFORE, the Designated States request that they be permitted to intervene as party plaintiffs in this case to assert the claims set forth in the attached Complaint in Intervention.

Respectfully submitted,

JAMES F. FLUG*
PAMELA B. STUART
LOBEL NOVINS, LAMONT & FLUG
1275 K Street N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan and Ohio

JOHN K. VAN DE KAMP
Attorney General of California
ANDREA S. ORDIN
Chief Assistant Attorney General
CAROLE R. KORNBLUM
Assistant Attorney General
YEORYIOS C. APALLAS*
Deputy Attorney General
350 McAllister Street, 6000
San Francisco, CA 94102
(415) 557-4100

Attorneys for the State of California

*Counsel of Record

FRANK J. KELLEY
Attorney General
ANDREW QUINN
Assistant Attorney General
and State Public Administrator
401 S. Washington Square
Plaza One Building, 3rd Floor
Lansing, Michigan 48913
(517)373-1145

Attorneys for the State of Michigan

ROBERT M. SPIRE
Attorney General of Nebraska
DALE A. COMER*
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2628

Attorneys for the State of Nebraska

ANTHONY J.
CELEBREZZE, JR.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

Attorney for the State of Ohio

JAMES E. O'NEIL
Attorney General of Rhode Island
NICHOLAS TROTT LONG
Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

Attorneys for Anthony J. Solomon, General Treasurer of Rhode Island

*Counsel of Record

November 17, 1989

No. 111 Original

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND
Plaintiffs in Intervention.

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND

The states of California, Michigan, Nebraska, Ohio, and Rhode Island, Plaintiffs in Intervention, by and

through their Attorneys General, file this Complaint in Intervention through which they seek a judgment that New York pay to Plaintiffs in Intervention all Excess Receipts and Additional Excess Receipts attributable to commercial activities in their respective states, and that New York be enjoined from interfering with their right in the future to claim and take possession of Excess Receipts and Additional Excess Receipts, and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ('Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property (the "Excess Receipts") held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for leave to File Complaint in Intervention. The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firm and nonbrokerage firm intermediaries (the "Additional Excess Receipts").

5. Shortly thereafter, numerous other jurisdictions filed motions to intervene and on September 13, 1989, the Special Master filed with the Court the Report of the Special Master on Motions to Intervene in which he recommends that the various motions to intervene be granted.[1]

III. INTEREST AND CLAIM OF PLAINTIFFS IN INTERVENTION

6. Plaintiffs in Intervention are the States of California, Michigan, Nebraska, Ohio, and Rhode Island (the "Designated States").

7. The Designated States seek a determination of

---

1. The Special Master recommended that the intervention motions of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah, Washington, Kentucky, Pennsylvania, the District of Columbia, Idaho, New Mexico, Tennessee, Virginia and Wisconsin be granted. On October 16, 1989 the Court ordered the Special Master's September 13, 1989 Report to be filed.

their rights to certain unclaimed intangible personal property, referred to as "Excess Receipts" and "Additional Excess Receipts" (collectively, "Unclaimed Funds") as defined in subparagraphs (a) and (b) below, which comes into being and acquires its character as unclaimed property in the context of securities transactions:

(a) "Excess Receipts" consist of certain unclaimed payments[2] of dividends, profits, principal, interest, and securities[3] representing any of the foregoing (collectively "Distributions"), held or formerly held by brokerage firms (regardless of where incorporated). Upon information and belief, Excess Receipts are maintained in a "Suspense Account" until expiration of the New York dormancy period, after which time they generally are demanded by and are remitted to New York without any determination by such firms that New York is the state of the last known address of the beneficial owner, resulting in an allocation among the states which is not in proportion to the commercial activities which gave rise to the unclaimed payments.

(b) "Additional Excess Receipts" consist of Distributions as described in (a) except that they (1) are presently being remitted, or which may be remitted, to New York by nonbrokerage firm intermediaries, such as

---

2. Including, but not limited to, reorganization, redemption, and maturity payments.

3. The term "security" is defined as it is in the Securities Exchange Act of 1934, 15 U.S.C. §78c(a)(10).

banks and clearinghouses for the settlement of trades in securities, or (2) are unclaimed principal and interest payments on state and municipal obligations not otherwise included in (a) that are held either by brokerage or non-brokerage intermediaries.

8. The Unclaimed Funds claimed herein consist of unclaimed property (under each of the Designated States' relevant unclaimed property law) which comes into being when Distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities giving rise to the Distributions, are received by holders who do not themselves have a claim to such funds and to whom the beneficial owners, if any, are unknown. Such holders are intermediaries in the chain of distribution, such as banks, brokerage firms and clearinghouses, which do not act on their own behalf, but receive, hold, and/or remit distributions on behalf of, or for the benefit of, others who have or have had an interest in the underlying security.

9. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount"). Such allocations are administratively feasible because relevant books and records are maintained in a form from which the pertinent information is readily ascertainable.

10. The Designated States assert their claims pursuant to their respective unclaimed property laws which provide for the escheat of abandoned or unclaimed tangible and intangible personal property when the owner of the property cannot be found by the holder of the property, and no claim to the property has been made within the applicable dormancy period.[4]

11. Upon information and belief, portions of the Unclaimed Funds presently being remitted to New York are being commingled with the general funds of New York, are being expended by New York for general governmental purposes, and are not being held separate by New York subject to claims by the rightful owners or by other states with superior claims to the funds.

PRAYER FOR RELIEF

WHEREFORE, the Designated States pray:

1. That New York be restrained and enjoined from demanding or collecting such Unclaimed Funds, and from expending any such sums collected, but presently unencumbered and unspent, which are attributable to Unclaimed Funds being claimed by the Designated States

---

4. See, California Code of Civil Procedure §§1500-1582; Michigan Code of Escheats, Act No. 329 of the Public Acts of 1947, as amended, Michigan Compiled Laws, §567.1 *et seq.*; Nebraska Revised Statutes, §69-1301 *et seq.* (Reissue 1986); Ohio, Rev. Code Ann. §169.01 *et seq;* Rhode Island, Gen. Laws, §33-21-11, *et seq.*

through this action, and that all such Unclaimed Funds be segregated and turned over to the custody of the Special Master until such time as this controversy is resolved;

2. That judgment be entered declaring that, in the circumstances described herein, if the addresses of the beneficial owners are unknown, the Allocated Amount of Unclaimed Funds held by brokerage firms and other intermediaries attributable to corporate and governmental issuers is subject to the claim of each state where the commercial activities occurred which gave rise to the Unclaimed Funds;

3. That computation of an Allocated Amount in accordance with such judgment be deemed for all purposes as, and be accepted as satisfying any state demands for, a report or allocation in accordance with the last known address of the person entitled to such property on the books and records of the holder;

4. That New York be directed to account for, and pay or deliver to each of the Designated States, the respective Allocated Amounts of all Unclaimed Funds it has received and may receive, where the addresses of the beneficial owners of the Unclaimed Funds are unknown, and the Funds are deemed abandoned pursuant to the applicable dormancy period under each such Designated State's unclaimed property law;

5. That a reasonable fund be created from Unclaimed Funds presently being held by New York to cover the compensation of the Special Master, his

technical, stenographic, and clerical assistants, the cost of printing his reports to this Court, the retention of experts to advise the Special Master as he deems necessary and appropriate and for all other proper expenses. Such funds may be credited against any interest adjudged owing with respect to such Unclaimed Funds.

6. Such other and further relief as this Court deems just and proper.,

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street N.W.
Suite 770
Washington, D.C. 2005
(202) 371-6626

Attorneys for the States of Michigan and Ohio

JOHN K. VAN DE KAMP
Attorney General of California
ANDREA S. ORDIN
Chief Assistant Attorney General
CAROLE R. KORNBLUM
Assistant Attorney General
YEORYIOS C. APALLAS*
Deputy Attorney General
350 McAllister, Room 6000
San Francisco, CA 94102
(415) 557-4100

Attorneys for the State of California

*Counsel of Record

FRANK J. KELLEY
Attorney General
ANDREW QUINN
Assistant Attorney General
and State Public Administrator
401 S. Washington Square
Plaza One Building, 3rd Floor
Lansing, Michigan 48913
(517) 373-1145

Attorneys for the State of Michigan

ROBERT M. SPIRE
Attorney General of Nebraska
DALE A. COMER*
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2682

Attorneys for the State of Nebraska

*Counsel of Record

ANTHONY J.
CELEBREZZE, JR.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

Attorney for the State of Ohio

JAMES E. O'NEIL
Attorney General of Rhode
Island
NICHOLAS TROTT LONG
Assistant Attorney General
72 Pine Street
Providence, Rhode Island
02903
(401) 274-4400

Attorneys for Anthony J. Solomon, General Treasurer of Rhode Island

November 17, 1989

EXHIBIT A TO COMPLAINT IN INTERVENTION

UNCLAIMED PROPERTY AND ESCHEAT LAWS OF THE DESIGNATED STATES

CALIFORNIA—*Code of Civil Procedure §§1500-1582*

MICHIGAN—*Code of Escheats, Act No. 329 of the Public Acts of 1947, as amended, Michigan Compiled Laws, §567.1 et seq.*

NEBRASKA—*Nebraska Revised Statutes §69-1301 et seq. (Reissue 1986).*

OHIO—*Ohio, Rev. Code Ann. §169.01 et seq.*

RHODE ISLAND—*Rhode Island, Gen. Laws, §33-21-11, et seq.*

No. 111 Original

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF CALIFORNIA, MICHIGAN,
NEBRASKA, OHIO, AND RHODE ISLAND,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	18
ARGUMENT	21
I. APPLICANTS MEET THE REQUIREMENTS FOR INTERVENTION	21
II. THE COURT'S PRECEDENTS CALL FOR INTERVENTION IN THESE CIRCUMSTANCES	24
CONCLUSION	25

TABLE OF AUTHORITIES

CASES	Page
Litigation Management Order No. 1, October 18, 1989	22, 23
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Report of the Special Master on Motions for Intervention, September 13, 1989	22
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*
Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961)	24

FEDERAL RULES	
Fed. R. Civ. Pro. 24(a)(2)	21
Fed. R. Civ. Pro. 24(b)	22, 23
U.S. Supreme Court Rule 9.2	21

No. 111 Original

IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1989

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO, AND RHODE ISLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the State of New York ("New York") as to which state is entitled to

claim and take possession of certain unclaimed intangible personal property. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention, asserting claims to portions of the same unclaimed property and similar types of property. The States of California, Michigan, Nebraska, Ohio, and Rhode Island (the "Designated States") seek leave to intervene so that they may assert their claims to portions of this unclaimed property to which they are entitled.

STATEMENT OF THE CASE

This original action concerns certain intangible property generated by securities transactions and by the payments of dividends, interest and principal in cases where the address of the rightful owner of the intangible property is unknown. New York, Delaware and Texas have asserted rights to the property based upon conflicting theories.

The accompanying Complaint in Intervention fully sets forth the entitlement of the Designated States to the unclaimed property at issue referred to as "Excess Receipts" and "Additional Excess Receipts"[1/] collectively referred as "Unclaimed Funds". These Unclaimed Funds consist of Distributions received by brokerage firms. When there is no known owner entitled to claim these

---

1. These terms are defined in the accompanying Complaint In Intervention.

Distributions they remain in "Suspense Accounts" at the brokerage firm for three years, and thereafter are currently being remitted to New York.

Delaware, New York, and Texas purport to base their respective claims on the rulings of this Court in *Texas v. New Jersey*, 379 U. S. 674 (1965) and *Pennsylvania v. New York*, 407 U. S. 206 (1972). These cases held that unclaimed property may be escheated by the state of the last known address of its owner, and if that address is unknown, to the state of incorporation of the debtor. The Court said that disputes of this nature by states over escheatable property should be determined primarily on principles of "fairness" and ease of administration. Further, the Court said that distribution to the claimant states "in proportion to the commercial activities of their residents" could accomplish both purposes. *Texas v. New Jersey, supra*, 379 U. S. at 681.

Delaware argues that certain Excess Receipts should be remitted to Delaware as the state of incorporation of the brokerage firms holding such funds[2/] since the identities of the Beneficial Owners of the Excess Receipts are unknown. New York contends that the Excess Receipts should be returned to that state, for the reason that the Excess Receipts are owed to other brokerage firms whose "trading addresses" are in New

---

2. Delaware limits its complaint to brokerage firms incorporated in Delaware, since its theory encompasses only such firms. The Complaint of the Designated States is not so restricted.

York. Texas says that the Excess Receipts should be remitted to the state of incorporation of the issuer when a last known address of the true beneficial owner is unavailable because the Excess Receipts constitute a debt of the Issuer. The Designated States also claim a portion of these same Excess Receipts under the holdings of this Court in *Texas v. New Jersey, supra*, and *Pennsylvania v. New York, supra*, but believe that proper application of those precedents in these circumstances should result in distribution of a substantial portion of the funds at issue to the Designated States rather than to Delaware, Texas, or New York. Each Designated State claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities or government debt instruments and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount").[3/] These claims are asserted pursuant to each state's unclaimed property law, the relevant portions of which are

---

3. The State of the relevant commercial activity is the state:

•of the last known address of the last known beneficial owner (as it appears on the books and records of the holder, or of any intermediary acting for such holder or owner) of the underlying security, except that

• such address may be presumed to be the state of the local branch, office, or agency at which such owner purchased the security or maintained the account containing the security.

cited in Exhibit A to the proposed Complaint in Intervention.

ARGUMENT

I

APPLICANTS MEET THE REQUIREMENTS FOR INTERVENTION

Intervention is proper because the Designated States have satisfied the requirements for intervention set forth in Rule 24(a)(2) of the Federal Rules of Civil Procedure[4] as incorporated in Sup. Ct. R. 9.2,[5] and are therefore entitled to intervene as a matter of right. The

---

4. Pursuant to Rule 24(a)(2), Fed. R. Civ. Pro., anyone who timely applies shall be permitted to intervene in the action:

> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

5. Rule 9.2 of the Supreme Court directs that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions."

disposition of this action is likely, as a practical matter, to impair the ability of the Designated States to protect their interests in the disputed property in the absence of their intervention as plaintiffs.

By this intervention, the Designated States claim a portion of the specific unclaimed property which constitutes the subject matter of this action. While the precise amount of the unclaimed property claimed by the Designated States is presently unknown, on information and belief, the amount is substantial.

The State of Texas has been permitted to intervene in the instant case, and the Special Master appointed by this Court has stated his intention to recommend that motions of all states seeking to intervene in a timely manner be granted. *See, Report of the Special Master on Motions for Intervention, September 13, 1989; Litigation Management Order No. 1, October 18, 1989, as amended.*

Because their laws are not identical to those of the other states and because they are asserting a position distinct from those of Delaware, New York and Texas, the Designated States have interests that are not adequately represented by existing parties. In fact, the absence of the Designated States from this litigation might bar them from asserting claims to property to which they might otherwise be entitled. The Designated States should therefore be permitted to intervene as a matter of right.

Alternatively, the Designated States should be permitted to intervene pursuant to Rule 24(b), Federal

Rules of Civil Procedure as a matter of discretion.[6/] Permissive intervention is appropriate because, without the intervention of the Designated States, matters involving issues of fact and law common to those presently in this lawsuit, and involving potentially hundreds of millions of dollars, will of necessity be decided for the Designated States by implication and without a complete presentation of their points of view on the issues. Additionally, the facts which the Designated States will rely upon in order to support their claim are either already before the Court or will inevitably be developed during the course of these proceedings. Clearly, the claims of the Designated States to the unclaimed property at issue involve questions of law and fact common to those already present in this litigation.

Intervention by the Designated States' motion is timely in light of the October 18, 1989, ruling of the Special Master that prospective intervenors filing motions for leave to intervene within thirty days of that date will join the same scheduling track as presently participating parties. *Litigation Order No. 1, supra.* Thus, the proceedings will not be delayed by the granting of this motion.

---

6. Pursuant to Rule 24(b), Fed. R. Civ. Pro., the Court may exercise its discretion and allow permissive intervention if an applicant's claim involves issues of fact or law common to those already present in the litigation and the intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties.

II

THIS COURT'S PRECEDENTS CALL FOR INTERVENTION IN THESE CIRCUMSTANCES

Intervention is proper under the principles established in *Western Union Telegraph Co. v. Pennsylvania*, 368 U. S. 71 (1961). In that case, the Court recognized the difficulties inherent in resolving controversies among different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." Id. at 79. See also, *Pennsylvania v. New York, supra; Texas v. New Jersey, supra* (both allowing intervention of additional states in unclaimed property cases). The Designated States seek by this Intervention an opportunity to so present their claims.

CONCLUSION

For the reasons stated, the Motion of the Designated States for Leave to Intervene as Plaintiffs should be granted.

Respectfully submitted,

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street N.W.
Suite 770
Washington, D.C. 2005
(202) 371-6626

Attorneys for the States of Michigan and Ohio

*Counsel of Record

JOHN K. VAN DE KAMP
Attorney General
ANDREA S. ORDIN
Chief Assistant Attorney General
CAROLE R. KORNBLUM
Assistant Attorney General
YEORYIOS C. APALLAS*
Deputy Attorney General
350 McAllister, Room 6000
San Francisco, CA 94102
(415) 557-4100

Attorneys for the State of California

FRANK J. KELLEY
Attorney General
ANDREW QUINN
Assistant Attorney General
and State Public Administrator
401 S. Washington Square
Plaza One Building, 3rd Floor
Lansing, Michigan 48913
(517) 373-1145

Attorneys for the State of Michigan

ROBERT M. SPIRE
Attorney General of Nebraska
DALE A. COMER*
Assistant Attorney General
2115 State Capitol
Lincoln, Nebraska 68509-8920
(402) 471-2628

Attorneys for the State of Nebraska

ANTHONY J.
CELEBREZZE, JR.
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

Attorney for the State of Ohio

JAMES E. O'NEIL
Attorney General of Rhode Island
NICHOLAS TROTT LONG
Assistant Attorney General
72 Pine Street
Providence, Rhode Island 02903

Attorneys for Anthony J. Solomon, General Treasurer of Rhode Island

*Counsel of Record

November 17, 1989

PROOF OF SERVICE

I, YEORYIOS C. APALLAS, certify that I am counsel of record for Plaintiff in Intervention, the State of California, that I am a member of the Bar of the Supreme Court of the United States, and that on the 16th day of November, 1989, I served copies of the foregoing Motion for Leave to File Complaint in Intervention, Complaint in Intervention, and Brief in Support of Motion for Leave to File Complaint in Intervention, on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

The Honorable Thomas H. Jackson
Special Master
School of Law
University of Virginia
Charlottesville, VA 22901

The Honorable Robert Abrams
Attorney General
State of New York
Department of Law
120 Broadway
New York, NY 10271

Christopher Keith Hall
Assistant Attorney General of
New York
Department of Law
120 Broadway
New York, NY 10271

The Honorable Roger A. Tellinghuisen

Attorney General of South Dakota
State Capitol
Pierre, SD 57501-5090

The Honorable Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, PA 17120

Janice L. Anderson
Deputy Attorney General
Litigation Section
15th Floor, Strawberry Square
Harrisburg, PA 17120

Richard H. Forman
Solicitor General of Colorado
State Services Building
1525 Sherman Street
Denver, CO 80203

Daniel D. Stier
Assistant Attorney General of Wisconsin
123 West Washington Avenue
P. O. Box 7857
Madison, WI 53706

Charles L. Stutts
Office of the Comptroller of Florida
The Capitol, Suite 1302
Tallahassee, FL 32399-0350

George W. K. Snyder, Jr.
Assistant Attorney General
P. O. Drawer 1508
Santa Fe, NM 87504

Samuel Shapiro

State Treasurer
State of Maine
Augusta, ME 04333

The Honorable Thomas J. Miller
Attorney General of Iowa
Hoover Building
Des Moines, IA 50319

The Honorable Jim Mattox
Attorney General of Texas
Supreme Court Building
P. O. Box 12548, Capitol Station
Austin, TX 78711-2548

Mary Keller
First Assistant Attorney General
Supreme Court Building
P. O. Box 12548, Capitol Station
Austin, TX 78711-2548

James A. Thomassen
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, TX 78711

The Honorable Charles M. Oberley, III
Attorney General of the State
of Delaware
820 North French Street
Wilmington, DE 19801

Richard L.Sutton, Esq.
Morris, Nichols, Arsht & Tunnell
1105 North Market Street
P. O. Box 1347
Wilmington, DE 19899

E. Suzanne Darling
Assistant Attorney General
Commonwealth of Virginia
Office of the Attorney General
Supreme Court Building
101 North Eighth Street
Richmond, VA 23219
Theodore V. Spangler, Jr.
Deputy Attorney General
P. O. Box 36
Boise, ID 83722
Ian A. MacPherson
Assistant Attorney General
Department of Law
1275 West Washington
Phoenix, AZ 85007
William J. Prensky
Assistant Attorney General
110 Sherman Street
Hartford, CT 06105
Michael W. Catalano
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, TN 37219-5025
Lutz Alexander Prager
Assistant Deputy Corporation Counsel
Office of the Corporation Counsel
Room 305, District Building
Washington, DC 20004
Bernard Nash, Esq.
Dickstein, Shapiro & Morin

2101 L Street, NW
Washington, DC 20037
The Honorable Don Siegelman
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, AL 36130
The Honorable Warren Price, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, HI 96813
The Honorable Neil F. Hartigan
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, IL 60601
The Honorable Linley E. Pearson
Attorney General
State of Indiana
219 State House
Indianapolis, IN 46204
The Honorable Robert T. Stephan
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center, Second Floor
Topeka, KS 66612
The Honorable Frederic J. Cowan
Attorney General

Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, KY 40601

The Honorable William J. Guste, Jr.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, LA 70804

The Honorable Marc Racicot
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620

The Honorable Brian McKay
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

The Honorable Robert H. Henry
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, OK 73105

The Honorable R. Paul Van Dam
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114

The Honorable Kenneth O. Eikenberry

Attorney General
State of Washington
Highways-License Building
7th Floor, MS PB-71
Olympia, WA 98504

Andrew J. Connick, Esq.
Milbank, Tweed, Hadley & McCloy
One Chase Manhattan Plaza
New York, NY 10005

Judith Welcom, Esq.
Brown & Wood
One World Trade Center
New York, NY 10048

Douglas A. Johnson
Assistant Attorney General
State of North Carolina
Department of Justice
P. O. Box 629
Raleigh, NC 27602-0629

The Honorable Michael N. Castle
Governor of the State of Delaware
820 N. French Street, 12th Floor
Wilmington, Delaware 19801

Francis J. Lorson, Esq.
Chief Deputy Clerk
U. S. Supreme Court
One First Street, NE
Washington, DC 20543

The Honorable Mario M. Cuomo
Governor of the State of New York
New York State Capitol
Eagle & Washington Avenues

Albany, NY 12224
Gregory D. Huwe
Assistant Attorney General
State of Minnesota
Office of the Attorney General
1100 Bremer Tower
Seventh Place and Minnesota Street
St. Paul, MN 55101
Richard H. Forman
Solicitor General of Colorado
State Services Building
1525 Sherman Street
Denver, CO 80203

YEORYIOS C. APALLAS
Deputy Attorney General

MOTION FILED
NOV 20 1989

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF COLORADO FOR LEAVE TO INTERVENE AND COMPLAINT IN INTERVENTION

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

MAURICE G. KNAIZER
Deputy Attorney General
General Legal Services Section
[Counsel of Record]

Attorneys for State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

MOTION OF THE STATE OF COLORADO FOR LEAVE TO INTERVENE 1

COMPLAINT IN INTERVENTION 7

I. INTRODUCTION 7

II. JURISDICTION 8

III. PENDING ACTION 8

IV. INTEREST AND CLAIM OF COLORADO 9

V. DEFINITIONS 11

VI. PRAYER FOR RELIEF 11

APPENDIX TO MOTION

Selected Sections Of The Colorado Unclaimed Property Act ..... App. 1

TABLE OF AUTHORITIES

Page

Cases

Pennsylvania v. New York, 407 U.S. 206 (1972) 5

Texas v. New Jersey, 379 U.S. 674 (1965) 10

Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961) 5

Statutes

28 U.S.C. § 1251 8

§ Colo. Rev. Stat. §§ 38-13-101 to 38-13-134 (1988 Supp.) 4, 10

§ Colo. Rev. Stat. §§ 38-13-102(7)(a)(I)-(V) and (b), (6), (3) and 38-13-103 and 38-13-104 4

Rules

Fed. R. Civ. P. 24(a)(2) 5

Fed. R. Civ. P. 24(b) 5

Constitutions

U.S. Const. art. III, § 2 8

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF COLORADO FOR LEAVE TO INTERVENE

Pursuant to rule 9 of the rules of the Supreme Court, the State of Colorado, a sovereign state of the United States of America, by and through Duane Woodard, Attorney General for the State of Colorado, moves this Court for an order permitting intervention in the above-styled case, and permitting the adoption, to the extent appropriate, of the brief in support of motion for leave to file a complaint and the amended complaint filed by the

State of (Texas), the plaintiff in intervention. In support of this motion, the State of Colorado states the following:

1. On or about May 31, 1988, this Court granted the motion of plaintiff, State of Delaware (Delaware), for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant, State of New York (New York), as to which state is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property (excess receipts),[1] held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas Jackson was appointed Special Master in this case.

3. On February 21, 1989, this Court granted the motion of Texas to intervene and file its complaint in intervention in this case.

4. As set forth in detail in its amended complaint, Texas claims a portion of the excess receipts which constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of the excess receipts held or formerly held by securities brokerage houses incorporated in Delaware which are attributable to issuers incorporated in Texas.

---

[1] In its complaint in intervention and amended complaint, the plaintiff in intervention, Texas, has defined certain terms related to this case. The State of Colorado incorporates those definitions into this motion by reference.

5. Texas also claims the right to take custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company (DTC) and excess receipts which have arisen in connection with distributions made by Texas municipal and other governmental issuers (additional excess receipts) which are now being demanded by or remitted to New York. It is the understanding of the State of Colorado that this Court intends to consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims a portion of the excess receipts and the additional excess receipts for the reason that they constitute a debt owed by the issuer to the securities' beneficial owner. If the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under the state's unclaimed property law.

7. The State of Colorado claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional excess receipts attributable to the issuers incorporated in the State of Colorado and that portion attributable to Colorado municipalities and other governmental entities.

8. The amount of excess receipts and additional excess receipts that the State of Colorado is entitled to claim is presently unknown. The State of Colorado has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess

receipts. However, it is probable that at least one issuer incorporated in the State of Colorado has generated excess receipts and/or additional excess receipts. Moreover, it is virtually certain that bonds issued by Colorado municipalities and other governmental entities have generated additional excess receipts subject to the claim of the State of Colorado.

9. The State of Colorado asserts its claim pursuant to Colo. Rev. Stat. §§ 38-13-101 to 38-13-134 (1988 Supp.), which provides that except as otherwise provided by this article, all intangible property, including any income or increment derived therefrom, that is held, issued or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than five years after it becomes payable or distributable is presumed abandoned and is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment are satisfied. (*See* Colo. Rev. Stat. §§ 38-13-102(7)(a)(I)-(V) and (b), (6), (3) and 38-13-103 and 38-13-104 set forth in Appendix to this motion.)

10. The State of Colorado supports and adopts as if set forth fully by the State of Colorado in its own pleadings the brief in support of motion for leave to file and the amended complaint of Texas, and the factual and legal arguments set forth therein, to the extent the same are applicable and relevant to the claims of the State of Colorado set forth in paragraph seven of this motion.

11. It is essential that the State of Colorado be permitted to intervene in its own right in this proceeding. The decision of this Court will establish a rule of law

which will conclusively determine the future right of the State of Colorado to claim and take possession of unclaimed property similar or identical in nature to the excess receipts and additional excess receipts at issue in this case. Additionally, if the State of Colorado is to establish its claim and right to take custodial possession of a portion of the property presently at issue, it must have access to the discovery process in order to identify those excess receipts and additional excess receipts attributable to issuers incorporated in the State of Colorado. As a party, the State of Colorado can obtain a ruling from this Court recognizing its right to take possession of specific unclaimed property pursuant to its individual unclaimed property laws and ordering New York to tender such property to the State of Coloado.

12. Based on the foregoing, the State of Colorado is entitled to intervene as a matter of right pursuant to Fed. R. Civ. P. 24(a)(2). Alternatively, the State of Colorado urges this Court to exercise its discretion and grant the requested intervention pursuant to Fed. R. Civ. P. 24(b).

13. The intervention of the State of Colorado in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to serve as lead counsel for those states, including the State of Colorado, wishing to intervene and represent themselves in this case. The addition of the State of Colorado as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

14. This court in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that this Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." Id, at 79. *See also Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity to present its claim that the State of Colorado seeks by urging this Court to grant leave to intervene in this case.

THEREFORE, the State of Colorado requests that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached complaint in intervention.

Respectfully submitted,

DUANE WOODARD
Attorney General
State of Colorado

CHARLES B. HOWE
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

MAURICE G. KNAIZER
Deputy Attorney General
General Legal Services Section
[Counsel of Record]
Attorneys for State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

No. 111 Original

In The

Supreme Court of the United States

October Term, 1988

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

COMPLAINT IN INTERVENTION

I.
INTRODUCTION

The State of Colorado (Colorado), the plaintiff in intervention, by Duane Woodard, Attorney General of the State of Colorado, with leave first had, files this complaint in intervention in the above styled and numbered cause, and states as follows:

II.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

III.

PENDING ACTION

2. On May 31, 1988, this Court granted the plaintiff State of Delaware's (Delaware) motion for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the defendant State of New York (New York) as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms in Delaware.

3. On February 21, 1989, this Court granted the State of Texas' (Texas) motion for leave to file a complaint in intervention. The Texas complaint also made subject to this suit certain additional unclaimed intangible personal property held by securities brokerage firms and non-brokerage firm intermediaries. On October 12, 1989 Texas filed its Amended Complaint.

IV.

INTEREST AND CLAIM OF COLORADO

4. Colorado acts by and through the Attorney General of Colorado, attorney for the Colorado State Treasurer, the state official who is charged under the laws of Colorado with the duty of prosecuting unclaimed property suits.

5. Colorado seeks a determination of its rights to certain of the unclaimed intangible personal property, referred to as "excess receipts" and "additional excess receipts," which comes into being and acquires its character as unclaimed property in the context of securities transactions.

6. Colorado is entitled to a portion of the excess receipts and additional excess receipts at issue in this litigation because they constitute a debt of the entity (issuer) initially issuing the shares of stock, bonds, debentures or other securities instruments owed to the entity or individual (beneficial owner) who has the economic rights to the security, including the entitlement to distributions.

7. If the identity and location of the beneficial owner is unknown, the state of incorporation of the issuer should be entitled to collect the excess receipts and additional excess receipts under that state's unclaimed property law. Under existing law and practice, a debt of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent so it should be similarly remitted to the state of incorporation of the issuer when held by other agents in the

securities holding, transfer, and distribution system. Distributions generated by issuers incorporated in Colorado and those generated by Colorado which are unclaimed and whose beneficial owner is unknown, should be returned to Colorado. The claim of Colorado is based on the practical reality and manner in which securities are traded and distributions are paid, and relies upon a strict interpretation of the Court's holding in *Texas v. New Jersey*, 379 U.S. 674 (1965).

8. By this action, Colorado seeks a judgment that New York pay to Colorado all excess receipts and additional excess receipts attributable to issuers incorporated in Colorado and those that are attributable to Colorado municipalities. Colorado further seeks a declaration that it has the right in the future to claim and take possession of excess receipts and additional excess receipts without interference from any other state. Colorado additionally seeks an order from this Court enjoining and restraining New York from demanding or collecting such excess receipts and additional excess receipts, and from expending any such sums collected, but presently unspent, which are attributable to issuers incorporated in Colorado and to Colorado municipalities, until such time as this controversy is resolved.

9. Colorado asserts its claim pursuant to Colo. Rev. Stat. §§ 38-13-101 to 38-13-134 (1988 Supp.) which provides, in essence, for the custodial taking of abandoned or unclaimed property when the existence and location of the owner of the property is unknown to the holder of the property, and no claim to such property has been asserted within the applicable dormancy period, which for most types of personal property in Colorado is five years.

V.

DEFINITIONS

10. Colorado adopts by reference the definitions of the terms set forth by Texas in its amended complaint in intervention on pages 10 through 15.

VI.

PRAYER FOR RELIEF

THEREFORE, Colorado requests that this Court grant the following relief:

1. That Colorado be allowed to intervene in this case to protect its interests;

2. That New York be restrained and enjoined from collecting any excess receipts and additional excess receipts attributable to issuers incorporated in Colorado or attributable to Colorado governmental issuers, and from expending any sums collected but presently unspent, consisting of such excess receipts and additional excess receipts, until such time as this controversy is resolved;

3. That New York be directed to pay or deliver to Colorado all of the excess receipts and additional excess receipts paid or delivered to New York attributable to issuers incorporated in Colorado and Colorado governmental issuers which have been abandoned for the applicable dormancy period under Colorado's unclaimed property law.

4. That Colorado be granted such other and further relief as the court deems just and equitable.

Respectfully submitted,

DUANE WOODARD
Attorney General

CHARLES B. HOWE
Chief Deputy Attorney General

RICHARD H. FORMAN
Solicitor General

MAURICE G. KNAIZER
Deputy Attorney General
General Legal Services Section
[Counsel of Record]

Attorneys for State of Colorado

1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: (303) 866-3611

APPENDIX

"Selected Sections of the Colorado Unclaimed Property Act"

Colorado Revised Statutes Part 1 of Article 13, Title 38.

38-13-102. Definitions and use of terms.

As used in this article, unless the context otherwise requires:

(3) "Banking organization" means a bank, trust company, savings bank, industrial bank, safe deposit company, or private banker or any organization defined by other law as a bank or banking organization.

* * *

(6) "Holder" means a banking or financial organization, wherever organized or domiciled, . . .

(7) (a) "Intangible property" includes:

(I) Moneys, checks, drafts, deposits, interest, dividends, and income;

(II) Credit balances, customer overpayments, gift certificates, refunds, credit memos, and unidentified remittances;

(III) Stocks and other intangible ownership interests in business associations;

(IV) Moneys deposited to redeem stocks, bonds, coupons, and other securities or to make distributions;

(V) Amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

(b) "Intangible property" does not include credit card accounts.

* * *

38-13-103. Property presumed abandoned – general rule.

(1) Except as otherwise provided by this article, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than five years after it became payable or distributable is presumed abandoned.

(2) Property is payable or distributable for the purpose of this article notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

38-13-104. General rules for taking custody of intangible unclaimed property. (1) Unless otherwise provided in this article or by other statute, intangible property is subject to the custody of this state as unclaimed property if the conditions raising a presumption of abandonment under section 38-13-103 and sections 38-13-105 to 38-13-109 are satisfied and:

(a) The last-known address, as shown on records of the holder, of the apparent owner is in this state;

(b) The records of the holder do not reflect the identity of the person entitled to the property and it is established that the last-known address of the person entitled to the property is in this state;

(c) The records of the holder do not reflect the last-known address of the apparent owner and it is established that:

(I) The last-known address of the person entitled to the property is in this state; or

(II) The holder is a domiciliary of this state and has not previously paid or delivered the property to the state of the last-known address of the apparent owner or other person entitled to the property;

(d) The last-known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary of this state;

(e) The last-known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary of this state; or

(f) The transaction out of which the property arose occurred in this state and:

(I) (A) The last-known address of the apparent owner or other person entitled to the property is unknown; or

(B) The last-known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property; and

(II) The holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

Supreme Court, U.S.
FILED
SEP 21 1989
JOSEPH F. SPANIOL, JR.
CLERK

(34)

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

T. TRAVIS MEDLOCK
Attorney General of South Carolina
JOE L. ALLEN, JR.
Chief Deputy Attorney General
RAY N. STEVENS
Deputy Attorney General
Office of the Attorney General
Post Office Box 125
Columbia, South Carolina 29214
803-737-4430
Counsel for the State of South Carolina

BEST AVAILABLE COPY

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF SOUTH CAROLINA FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of South Carolina, a sovereign state of the United States of America, by and through its Attorney General, T. Travis Medlock,

moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting it to adopt, to the extent appropriate, the amended complaint in intervention heretofore filed by the State of Texas, Plaintiff in Intervention. In support of this motion, the State of South Carolina would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal

property, consisting of monies and other intangible property, described as "excess receipts" by the Plaintiff in Intervention State of Texas ("Texas") in its complaint in intervention and held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master in this case.

3. On February 21, 1989, the Court granted the motion of Texas to intervene and file its complaint in intervention in this case. Subsequently, the Court further granted the motion of Texas to file an amended complaint.

4. As set forth in its amended complaint, Texas claims the

right to custodial possession of the excess receipts that constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of excess receipts held or formerly held by securities brokerage houses incorporated in Delaware that are attributable to issuers incorporated in Texas.

5. Texas also claims the right to custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company and additional excess receipts that have arisen in connection with distributions made by Texas municipal and other governmental issuers that are now being demanded by or remitted to New

York. It is the understanding of the State of South Carolina ("South Carolina") that the Court may consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims that, if the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the state of incorporation of the issuer under that state's unclaimed property law.

7. South Carolina claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional receipts attributable to issuers incorporated in South Carolina and that

portion attributable to South Carolina counties, municipalities, and other governmental entities.

8. The amount of excess receipts and additional excess receipts that South Carolina is entitled to claim is currently unknown. South Carolina has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess receipts. However, it is probable that at least one issuer incorporated in South Carolina has generated excess receipts and additional excess receipts. Moreover, it is a virtual certainty that bonds issued by South Carolina counties, municipalities and other governmental entities have generated additional excess receipts subject to the claim of South Carolina.

9. South Carolina asserts its claim pursuant to Title 27, Chapter 18, Code of Laws of South Carolina which provides, in essence, for the custodial taking of tangible and intangible personal property that is held in the ordinary course of the holder's business and has remained unclaimed by the owner for a period of five years.

10. South Carolina supports and adopts, as if fully set forth in these pleadings, Texas' amended complaint in intervention and the factual and legal arguments set forth therein, to the extent the same are applicable and relevant to the claims of South Carolina set forth in Paragraphs 7-9 above.

11. Although South Carolina adopts the amended complaint in

intervention filed by Texas, it is essential that South Carolina be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law that will conclusively determine the future right of South Carolina to take possession of unclaimed property similar or identical in nature to the property at issue herein. As a party, South Carolina can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its unclaimed property laws and ordering New York to tender such property to South Carolina.

12. In Litigation Management Order No. 1, dated as of October 18, 1989, the Special Master established a discovery schedule and a timetable for

the filing of Motions for Leave to Intervene by prospective intervenors. He stated that "[p]arties not meeting this timetable will be required, absent compelling reasons, to fit in to ongoing discovery and motions without disruption of that scheduling track."

13. In Discovery Order No. 5, dated March 16, 1990, the Special Master modified and extended the discovery schedule.

14. Intervention by South Carolina will not delay the progress of this case, since it is prepared to comply with the schedule specified in Litigation Management Order No. 1, as modified and extended by Discovery Order No. 5; and it agrees to "fit in to ongoing discovery and motions" without disruption of that schedule.

15. Based on the foregoing, South Carolina is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, South Carolina urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b).

16. The intervention of South Carolina in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to coordinate the effort among those states wishing to intervene and represent themselves in this case. The addition of South Carolina as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the

number of parties to this litigation.

II.

17. The Court, in Western Union Telegraph Company v. Pennsylvania, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies between different states over their respective rights to take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." Id. at 79. See also, Pennsylvania v. New York, 407 U.S. 206 (1972). It is such an opportunity that South Carolina seeks by urging this Court to grant leave to intervene.

Wherefore, South Carolina prays that it be permitted to intervene as a party plaintiff in this case, and to adopt, as its own and as if fully set forth, Texas' amended complaint in intervention, and the factual and legal arguments set forth therein, to the extent the same are relevant and applicable to the claims of South Carolina, or alternatively prays that it be permitted to file its own complaint in intervention setting forth the factual and legal arguments asserted by Texas in its amended complaint and seeking, on behalf of South Carolina, relief of the same nature as Texas.

Respectfully submitted,

State of South Carolina
T. Travis Medlock,
Attorney General

By: Ray N. Stevens
Deputy Attorney General
Counsel of Record

T. TRAVIS MEDLOCK
Attorney General of South Carolina

JOE L. ALLEN, JR.
Chief Deputy Attorney General

RAY N. STEVENS
Deputy Attorney General

Office of Attorney General
Post Office Box 125
Columbia, South Carolina 29214
803-737-4430

Counsel for the State of South Carolina

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

TABLE OF CONTENTS

Page

JURISDICTION 19

STATEMENT OF THE CASE 19

SUMMARY OF ARGUMENT 23

ARGUMENT

I. SOUTH CAROLINA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE, AND THE STANDARDS ESTABLISHED IN TEXAS V. NEW JERSEY, 379 U.S. 674 (1965) 24

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b), FEDERAL RULES OF CIVIL PROCEDURE 28

CONCLUSION 29

PROOF OF SERVICE 31

TABLE OF AUTHORITIES

Page

CASES

Pennsylvania v. New York, 407 U.S. 206 (1972) 21

Texas v. New Jersey, 379 U.S. 674 (1965) ..... passim

CONSTITUTION

Constitution of the United States, Article III, Section 2 19

STATUTES

United States Code, Title 28, Section 1251(a) 19

RULES

Fed. R.Civ.P.24 24
Fed. R.Civ.P.24(a)(2) 23,24,25
Fed. R.Civ. P.24(b) 24,28
U.S. Sup.Ct.R.9.2 24

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF SOUTH CAROLINA IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original

jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York. On February 21, 1989, the Court granted the motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its complaint in intervention in this case. Subsequently, the Court further granted the motion of Texas to file an amended complaint. Texas claims a portion of the unclaimed property at issue as well as additional unclaimed property that is of the same nature and arises in the same way as the property

already at issue. The State of South Carolina ("South Carolina") also claims a portion of the original property and the additional property at issue in this case. South Carolina seeks leave to intervene as a plaintiff in this suit and to adopt the amended complaint previously filed by Texas.

JURISDICTION

The Court has accepted original jurisdiction of this action pursuant to Article III, Section 2 of the Constitution of the United States and under United States Code Title 28, Section 1251(a).

STATEMENT OF THE CASE

The State of South Carolina seeks leave to intervene in this action, adopting the amended complaint filed by the State of Texas, Plaintiff in

Intervention, as its own. That complaint and the motion for leave to intervene filed by South Carolina set forth the character of the property at issue and the entitlement of South Carolina, Texas, and the remaining states to claim a portion of that property. Generally, the property consists of excess receipts and additional excess receipts, as described by Texas in its complaint in intervention. These receipts result from the system of securities trading, involving brokerage firms incorporated in Delaware and other states and trading in New York and the Depository Trust Company, a New York corporation. The owner of the property at issue is unknown, and the property itself has become abandoned. Under current

practice, the property is held for three years and then remitted to the State of New York.

The parties to this action all claim the property, or a portion thereof, pursuant to the rules of priority established by this Court in Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972). The parties differ, however, in their characterization of the unclaimed property and to whom it is owed. As a result, each party has a different theory of who is the "owner" and who is the "holder" of the property. Delaware's position is that the unclaimed property results from a debt owed by brokers incorporated in Delaware to beneficial owners whose addresses are

unknown. Under this theory, all the property escheats to Delaware as the state of incorporation of the "holders." New York claims that the property results from a debt owed by brokers to other brokers and banks which, for the most part, have trading addresses in New York. Under this theory, all the property escheats to New York as the state of last known address of the "holders." Texas takes the position that the unclaimed property is a result of a debt owed by the issuer of the security to the beneficial owner. If the address of the beneficial owner is unknown, the property goes to the "issuer's" state of incorporation. Under this theory, all 50 states share in the distribution of the property. South Carolina supports the Texas theory

and seeks leave to intervene and to adopt the Texas amended complaint as its own.

SUMMARY OF ARGUMENT

I. South Carolina claims the right to custodial possession of portions of the property that is the subject of this suit and satisfies the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and the standards set out in Texas v. New Jersey. South Carolina is entitled to intervene as a matter of right.

II. South Carolina claims an interest in the property that is the subject of this suit, and the intervention of South Carolina will not unduly delay this action or prejudice the rights of the original parties. Having satisfied the requirements for

permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, South Carolina's motion for leave to intervene should be granted.

ARGUMENT

I. SOUTH CAROLINA IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE AND THE STANDARDS ESTABLISHED IN TEXAS V. NEW JERSEY, 379 U.S. 674 (1965).

Rule 9.2 of the Rules of the Supreme Court provides that "[t]he form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court." Rule 24 of the Federal Rules of

Civil Procedure governs intervention generally. That rule provides that anyone who applies timely shall be permitted to intervene in an action:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed.R.Civ.P.24(a)(2).

South Carolina seeks leave of Court to intervene in this case because it claims an interest in the property that is the subject of this action. South Carolina claims all excess receipts that were issued by

corporations domiciled in South Carolina. Likewise, South Carolina claims all additional excess receipts that were issued by South Carolina domiciliaries and governmental entities. Although the amount of property subject to claim by South Carolina is difficult to estimate, it is substantial and sufficient to entitle South Carolina to intervene as a matter of right.

In the case of Texas v. New Jersey, this Court set a standard allowing any state that claimed an interest in the subject property to intervene in original actions involving unclaimed property. Because it claims a significant interest in the excess receipts and additional excess receipts at issue in this case, South Carolina

has satisfied the test of Texas v. New Jersey and should be allowed to intervene.

The Court's decision in this case will determine South Carolina's rights to the property at issue in this case. It is, therefore, important that South Carolina be allowed to intervene and to participate in the discovery process to identify the specific property to which it is entitled. Although South Carolina seeks to adopt the Texas' amended complaint, it is also important that South Carolina be allowed to advocate its own claim before the Court.

The standards for intervention as a matter of right have been satisfied, and South Carolina should be granted leave to intervene.

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 24(b) of the Federal Rules of Civil Procedure gives the Court discretion to allow permissive intervention where appropriate. As a sovereign state with a substantial interest in the outcome of this litigation, South Carolina should be allowed to intervene. South Carolina does not seek to interject a new theory of the case, but, rather, to join in the Texas amended complaint and to coordinate its efforts with Texas toward the ultimate resolution of this litigation. It is apparent, therefore, that intervention by South Carolina will not unduly delay this action or

prejudice the rights of the original parties. South Carolina has satisfied the standards for permissive intervention, and the Court should exercise its discretion to allow South Carolina to intervene.

CONCLUSION

For all these reasons, the motion of the State of South Carolina for leave to intervene as a plaintiff in this action and to adopt the amended complaint filed by the State of Texas should be granted. In the alternative, South Carolina should be granted leave to intervene and permitted to file its own complaint in intervention.

Respectfully submitted,

T. TRAVIS MEDLOCK
Attorney General

By: Ray N. Stevens
Deputy Attorney General
Counsel of Record

T. TRAVIS MEDLOCK
Attorney General of South Carolina

JOE L. ALLEN, JR.
Chief Deputy Attorney General

RAY N. STEVENS
Deputy Attorney General

Post Office Box 125
Columbia, South Carolina 29214
803-737-4430

Counsel for the State of South Carolina

PROOF OF SERVICE

I, Ray N. Stevens, Deputy Attorney General for the State of South Carolina, certify that I am a member of the bar of the Supreme Court of the United States, and that on the _____ day of _____, 1990, I served copies of the State of South Carolina's motion for leave to intervene and adopt complaint and brief in support of motion for leave to intervene and adopt complaint on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

Robert Abrams
Attorney General
State of New York
Department of Law
120 Broadway
New York, NY 10271

O. Peter Sherwood
Solicitor General
State of New York
Department of Law
120 Broadway
New York, NY 10271

Roger A. Tellinghuisen
Attorney General of South Dakota
State Capitol
Pierre, SD 57501-5090

Janice L. Anderson
Deputy Attorney General
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120

Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, PA 17120

Burneatta L. Bridge
Assistant Attorney General of Wisconsin
Wisconsin Department of Justice
PO Box 7857
Madison, WI 53707-7857

George W. K. Snyder, Jr.
Assistant Attorney General
State of New Mexico, PO Drawer 1508
Sante Fe, NM 87504-1508

Jim Mattox
Attorney General of Texas
Supreme Court Building
PO Box 12548, Capitol Station
Austin, TX 78711-2548

David A. Talbot, Jr.
Special Assistant Attorney General
State of Texas
Supreme Court Building
PO Box 12548, Capitol Station
Austin, TX 78711-2548

Francis J. Lorson, Esq.
Chief Deputy Clerk
U.S. Supreme Court
One First Street NE
Washington, DC 20543

Charles M. Oberley, III
Attorney General of the State of Delaware
820 North French Street
Wilmington, DE 19801

Richard L. Sutton, Esq.
Morris, Nichols, Arsht & Tunnell
1105 N. Market Street
PO Box 1347
Wilmington, DE 19899

E. Suzanne Darling
Assistant Attorney General
Commonwealth of Virginia
Office of the Attorney General
101 North Eighth Street
Richmond, VA 23219

Theodore V. Spangler, Jr.
Deputy Attorney General
State of Idaho
PO Box 36
Boise, ID 83722

Ian A. MacPherson
Assistant Attorney General
Department of Law
State of Arizona
1275 West Washington
Phoeniz, AZ 85007

William J. Prensky
Assistant Attorney General
State of Connecticut
110 Sherman Street
Hartford, CT 06105

Michael W. Catalano
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, TN 37219-5025

Lutz Alexander Prager
Assistant Deputy Corporation Counsel
Office of the Corporation Counsel
Room 305, District Building
Washington, DC 20004

Bernard Nash, Esq.
Dickstein, Shapiro & Morin
2101 L Street, NW
Washington, DC 20037

Don Siegelman
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, AL 36130

Warren Price, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, HI 96813

Neil F. Hartigan
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, IL 60601

Linley E. Pearson
Attorney General
State of Indiana
219 State House
Indianapolis, IN 46204

Robert T. Stephan
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center--Second Floor
Topeka, KS 66612

Frederic J. Cowan
Attorney General
Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, KY 40601

William J. Guste, Jr.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, LA 70804

Marc Racicot
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620

Brian McKay
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

Robert H. Henry
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, OK 73105

R. Paul Van Dam
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114

Kenneth O. Eikenberry
Attorney General
State of Washington
Highways-Licenses Building
7th Floor, MS PB-71
Olympia, WA 98504

Douglas A. Johnson
Assistant Attorney General
State of North Carolina
Department of Justice
PO Box 629
Raleigh, NC 27602-0629

Carol Mullins
Assistant Attorney General
State of Colorado
General Legal Services Section
1525 Sherman Street, 2nd Floor
Denver, CO 80203

Gregory D. Huwe
Assistant Attorney General
State of Minnesota
Office of the Attorney General
1100 Bremer Tower
Seventh Pl. & Minnesota Street
St. Paul, MN 55101

Richard H. Forman
Solicitor General of Colorado
State Services Building
1525 Sherman Street
Denver, CO 80203

Yeoryios C. Apallas, Esq.
Deputy Attorney General
State of California
Department of Justice
350 McAllister Street
Room 6000
San Francisco, CA 94102

James F. Flug, Esq.
Lobel, Novins, Lamont & Flug
1275 K Street, NW
Suite 770
Washington, DC 20005

Andrew Quinn
State Public Administrator
Michigan Attorney General's Office
Third Floor, Plaza 1 Building
401 S. Washington Square
Lansing, MI 48913

Robert J. Del Tufo
Attorney General
State of Jersey
Richard J. Hughes Justice Complex
CN080
Trenton, NJ 08625

Nichols J. Spaeth
Attorney General
State of North Dakota
State Capitol
600 E Boulevard Ave.
Bismarck, ND 58505

Joseph B. Meyer
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002

Dean Thomas H. Jackson
Special Master
University of Virginia School of Law
Charlottesville, VA 22901

Supreme Court, U.S.
FILED
OCT 29 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF ALASKA AND VERMONT FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

October 29, 1990

[State Attorneys General Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

ATTORNEYS GENERAL OF THE APPLICANTS FOR INTERVENTION

Douglas B. Baily, Attorney General
State of Alaska
P.O. Box K
State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

Jeffrey L. Amestoy, Attorney General
State of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATES OF ALASKA AND VERMONT FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 9 of the Rules of the Supreme Court, the States of Alaska and Vermont (hereinafter the "States"), sovereign states of the United States of America, by and through their Attorneys General and Special Counsel, move this Court for an order permitting them to intervene as Plaintiffs in the above-entitled case and permitting their proposed Complaint in Intervention, attached hereto, to be filed. In support of this motion, and as more fully set forth in the States' Brief in Support of Motion for Leave to File Complaint in Intervention, the States allege as follows:

I.

1. The States incorporate Paragraphs 1 through 9 of the Motion of the States of Arkansas, Florida, Iowa,

Mississippi, Missouri, New Hampshire and West Virginia (hereinafter "Arkansas, *et al.*") for Leave to File Complaint in Intervention.

2. In Litigation Management Order No. 1, dated as of October 18, 1989, the Special Master established a discovery schedule and a timetable for the filing of Motions for Leave to Intervene by prospective intervenors. He stated that "[p]arties not meeting this timetable will be required, absent compelling reasons, to fit in to ongoing discovery and motions without disruption of that scheduling track" (¶ 8).

3. In Litigation Management Order No. 2, dated July 16, 1990, as modified by Discovery Order No. 13, dated August 13, 1990, the Special Master established a briefing schedule pursuant to which dispositive motions are due 60 days after the close of discovery on August 31, 1990 (*i.e.*, on October 30, 1990).

4. The States' Complaint in Intervention is identical to the Complaint in Intervention filed by the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (hereinafter "Alabama, *et al.*"), the Complaint in Intervention filed by Arkansas, *et al.* and the Complaint in Intervention filed by the States of New Jersey, North Dakota and Wyoming (hereinafter "New Jersey, *et al.*"). As referenced in the attached proposed Complaint in Intervention, the States seek a determination of their rights to certain unclaimed intangible personal property, as further described in Paragraphs 11 through 16 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention, which are adopted and incorporated herein.

5. The States' interests are not adequately represented by the original or intervening parties for the same reasons set forth in Paragraph 17 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention.

6. Intervention by the States will not delay the progress of this case, since the States are represented by the same counsel representing Alabama, *et al.*, Arkansas, *et al.* and New Jersey, *et al.*; they seek leave to file a Complaint in Intervention identical to that filed by Alabama, *et al.*, by Arkansas, *et al.* and by New Jersey, *et al.*; and they are prepared to comply with and be bound by the schedule specified in Litigation Management Order Nos. 1 and 2, as modified by Discovery Order No. 13.

7. For the foregoing reasons, the States are entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure.

II.

8. Alternatively, the States adopt and incorporate herein Paragraphs 20 through 25 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention.

III.

9. The States also adopt and incorporate herein Paragraphs 26 and 27 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention.

10. Wherefore, the States pray that their Motion for Leave to File Complaint in Intervention be granted.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)

ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER

DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

Douglas B. Baily, Attorney General
State of Alaska
P.O. Box K
State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

Jeffrey L. Amestoy, Attorney General
State of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

October 29, 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF ALASKA AND VERMONT,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF ALASKA AND VERMONT

The States of Alaska and Vermont (hereinafter the "States"), Plaintiffs in Intervention, by and through their Attorneys General and Special Counsel, file this Complaint in Intervention and allege as follows:

1. The States incorporate by reference as though fully recited herein Paragraphs 1 through 8 and the Prayer for Relief of the Complaint in Intervention of the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New

Hampshire and West Virginia, save for substituting their names as Plaintiffs in Intervention in Paragraph 4.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

Douglas B. Baily, Attorney General
State of Alaska
P.O. Box K
State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

Jeffrey L. Amestoy, Attorney General
State of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

October 29, 1990

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATES OF ALASKA AND VERMONT IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

The States of Alaska and Vermont (hereinafter the "States"), by and through their Attorneys General and Special Counsel, hereby adopt and incorporate by reference as though fully recited herein, in support of their Motion for Leave to File Complaint in Intervention, the Brief filed with this Court on November 17, 1989, by the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia (hereinafter "Arkansas, *et al.*") in Support of their Motion for Leave to File Complaint in Intervention.

In Litigation Management Order No. 1, dated as of October 18, 1989, the Special Master established a discovery schedule and a timetable for the filing of Motions for Leave to Intervene by prospective intervenors. He stated that "[p]arties not meeting this timetable will be required, absent compelling reasons, to fit in to ongoing discovery and motions without disruption of that scheduling track" (¶ 8). In Litigation Management Order No.

2, dated July 16, 1990, as modified by Discovery Order No. 13, dated August 13, 1990, the Special Master established a briefing schedule pursuant to which dispositive motions are due 60 days after the close of discovery on August 31, 1990 (*i.e.*, on October 30, 1990).

The States' motion should be granted for the reasons set forth in the Brief of Arkansas, *et al.* Intervention by the States will not delay the progress of this case, since the States are represented by the same counsel representing the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (hereinafter "Alabama, *et al.*"), Arkansas, *et al.* and the States of New Jersey, North Dakota and Wyoming (hereinafter "New Jersey, *et al.*"); they seek leave to file a Complaint in Intervention identical to that filed by Alabama, *et al.*, by *Arkansas, et al.* and by New Jersey, *et al.*; and they are prepared to comply with and be bound by the schedule specified in Litigation Management Order Nos. 1 and 2, as modified by Discovery Order No. 13.

CONCLUSION

For the reasons stated, the Motion of the States of Alaska and Vermont for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)

ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER

DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

Douglas B. Baily, Attorney General
State of Alaska
P.O. Box K
State Capitol
Juneau, Alaska 99811-0300
(907) 465-3600

Jeffrey L. Amestoy, Attorney General
State of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

October 29, 1990

Supreme Court, U.S.
FILED
OCT 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

36

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF MARYLAND FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
DENNIS M. SWEENEY
Deputy Attorney General
200 Saint Paul Place
Baltimore, Maryland
21202-2021
(301) 576-6300
SHELDON LASKIN
Assistant Attorney General
301 West Preston Street
Room 401
Baltimore, Maryland 21201
(301) 225-1561

*Counsel of Record

October 30, 1990

BEST AVAILABLE COPY

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

v. *Plaintiff-Intervenor,*

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF MARYLAND FOR LEAVE TO INTERVENE AND TO FILE COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Maryland, a sovereign state of the United States of America, by and through its Attorney General and its undersigned Counsel, move this Court for an order permitting the State of Maryland to intervene as a Plaintiff in the above-entitled case and permitting its proposed Complaint in Intervention, attached hereto, to be filed. In support of this motion, and as more fully set forth in its Brief in Support of

Motion for Leave to File Complaint in Intervention, the State of Maryland alleges as follows:

I.

1. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware, referred to by Delaware as "Escheatable Property of Unknowns."

2. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master.

3. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention. Texas, like Delaware, raised the issue as to which state is entitled to claim and take possession of "Escheatable Property of Unknowns," which it referred to as "Excess Receipts." The Texas complaint also made subject to this suit certain additional unclaimed intangible personal property held by clearinghouses for the settlement of trades in securities, and unclaimed principal and interest payments on state and municipal obligations ("Additional Excess Receipts").[1] On October 12, 1989, Texas filed a Motion for Leave to File Amended Complaint in Intervention, and an Amended Complaint In Intervention.

---

[1] The terms "Excess Receipts" and "Additional Excess Receipts" are defined in the accompanying Brief in Support of Motion for Leave to File Complaint in Intervention as well as in the Complaint in Intervention filed by the States of California, Michigan, Nebraska, Ohio, and Rhode Island which is incorporated by reference in the accompanying Complaint in Intervention.

4. On April 21, 1989, the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah, and Washington, and the Commonwealths of Pennsylvania ("Alabama, *et al.*") filed a Motion for Leave to File Complaint in Intervention, a Complaint in Intervention, and a Brief in Support of Complaint in Intervention.

5. On November 17, 1989, the States of California, Michigan, Ohio, Nebraska, and Rhode Island (the "Designated States") filed a Motion for Leave to File Complaint in Intervention, a Complaint in Intervention, and a Brief in Support of Motion for Leave to File Complaint in Intervention.

6. On various dates, the States of Arizona, Connecticut, Idaho, New Mexico, South Carolina, Tennessee, Virginia, and Wisconsin and the District of Columbia each filed a motion for leave to file a complaint in intervention and a proposed complaint substantively identical to that of Texas, except for the District of Columbia which advanced the Texas position as well as the position advanced by the Designated States.

7. On various dates, the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire, New Jersey, North Dakota, West Virginia, and Wyoming have filed a motion for leave to file a complaint in intervention and a proposed complaint substantively identical to that of Alabama, *et al.*

8. On November 1, 1989, the Special Master issued "Litigation Management Order No. 1," dated as of October 18, 1989, in which, in paragraph 8, he stated:

> States considering intervention are requested to make a prompt determination of their plans, such that motions for leave to intervene can be filed thirty (30) days from the date of this order [October 18, 1989]. Prospective intervenors meeting this timetable will be treated on the same scheduling track as

> parties presently participating, with only modest adjustments of schedule to accomodate their commencing active participation. Parties not meeting this timetable will be required, absent compelling reasons, to fit in to ongoing discovery and motions without disruption of that scheduling track.

9. In Discovery Order No. 5, dated March 16, 1990, Litigation Management Order No. 2 (part B, page 3), dated July 16, 1990, and Discovery Order No. 13, dated August 13, 1990, the Special Master modified and extended the discovery schedule. In part B of Litigation Management Order No. 2, the Special Master established a schedule for the filing of "dispositive motions directed at certain positions."

10. As specifically and particularly set forth in the proposed Complaint in Intervention, the State of Maryland claims a portion of the Excess Receipts and Additional Excess Receipts (collectively "Unclaimed Funds") which constitute the unclaimed property that is the subject matter of this controversy. The State of Maryland claims a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed Funds at issue (the "Allocated Amount").

11. The amount of Unclaimed Funds in issue in this litigation that the State of Maryland is entitled to claim is presently unknown, but, upon information and belief, is substantial.

12. The decision of the Court in this action will conclusively determine the right of the State of Maryland to claim and take possession of these Unclaimed Funds. If the position of either Delaware or New York or Texas is accepted, the State of Maryland may be forever precluded from taking possession of some or all of the unclaimed property as to which

there are conflicting claims. Because Delaware, New York, and the State of Maryland each asserts conflicting claims to the subject Unclaimed Funds, and no other party is asserting Maryland's right to its Allocated Amount, the interests of the State of Maryland are not adequately represented by existing parties.

13. The State of Maryland's Complaint in Intervention is substantively identical to the Complaint in Intervention filed by the Designated States, except that it seeks payment to Maryland of Maryland's Allocated Amount.

14. Intervention by the State of Maryland will not delay the progress of this case, since it is prepared to comply with the schedule specified in Litigation Management Order Nos. 1 and 2. The State of Maryland agrees to "fit in to ongoing discovery and motions" without disruption of the schedule established by the Special Master. It expects to file jointly with the Designated States and its counsel is already participating in the case as counsel for Michigan and Ohio. Intervention by the State of Maryland will aid in the resolution of the factual and legal issues presented by this litigation and will allow the various positions of the states to be resolved in a single proceeding and will avoid a multiplicity of lawsuits.

15. In *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), this Court recognized the difficulties inherent in resolving controversies between different states over their respective rights to take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. *See also, Pennsylvania v. New York*, 407 U.S. 206 (1972).

16. Based on the foregoing, and the arguments set forth in the attached Brief in support of this Motion, the State of

Maryland is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), or, in the alternative, in the exercise of the Court's discretion pursuant to Rule 24(b), Federal Rules of Civil Procedure.

WHEREFORE, the State of Maryland requests that it be permitted to intervene as a party plaintiff in this case to assert the claims set forth in the attached Complaint in Intervention.

Respectfully submitted,

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
DENNIS M. SWEENEY
Deputy Attorney General
200 Saint Paul Place
Baltimore, Maryland
21202-2021
(301) 576-6300
SHELDON LASKIN
Assistant Attorney General
301 West Preston Street
Room 401
Baltimore, Maryland 21201
(301) 225-1561

*Counsel of Record
October 30, 1990

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

v. *Plaintiff-Intervenor,*

STATE OF NEW YORK,

Defendant.

COMPLAINT IN INTERVENTION OF THE STATE OF MARYLAND

The State of Maryland, by and through its Attorney General and its undersigned Counsel, files this Complaint in Intervention and alleges as follows:

1. The State of Maryland incorporates by reference as though fully set forth herein Paragraphs 1 through 11 and the Prayer for Relief of the Complaint in Intervention of the States of California, Michigan, Ohio, Nebraska, and Rhode Island, except for adding the State of Maryland to the Plaintiffs in Intervention (the "Designated States") named in Paragraph 6 and adding to footnote 4 a citation to the State of Maryland's unclaimed property laws set forth in Exhibit A to this Complaint in Intervention.

Respectfully submitted,

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
DENNIS M. SWEENEY
Deputy Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202-2021
(301) 576-6300
SHELDON LASKIN
Assistant Attorney General
301 West Preston Street
Room 401
Baltimore, Maryland 21201
(301) 225-1561

*Counsel of Record
October 30, 1990

EXHIBIT A TO COMPLAINT IN INTERVENTION

UNCLAIMED PROPERTY AND ESCHEAT LAWS OF THE STATE OF MARYLAND

MARYLAND — Maryland Uniform Disposition of Abandoned Property Act, Md. Code Ann. §17-101, *et seq.*

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

v. *Plaintiff-Intervenor,*

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF MARYLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

TABLE OF CONTENTS

PAGE

STATEMENT OF THE CASE 14

ARGUMENT:

I. THE APPLICANT MEETS THE REQUIREMENTS FOR INTERVENTION . . 15

II. THIS COURT'S PRECEDENTS CALL FOR CALL FOR INTERVENTION IN THESE CIRCUMSTANCES 17

CONCLUSION 19

TABLE OF AUTHORITIES

	PAGE
CASES:	
Pennsylvania v. New York, 407 U.S. 206 (1972) . .	18
Texas v. New Jersey, 379 U.S. 674 (1965)	14, 18
Western Union Telegraph Co. v. Pennsylvania 368 U.S. 71 (1961)	17
FEDERAL RULES	
Fed. R. Civ. P. 24(a)(2)	15
Fed. R. Civ. P. 24(b)	16
Sup. Ct. R. 9.2	15
OTHER AUTHORITIES	
Litigation Management Order No. 1 October 18, 1989	16, 17
Report of the Special Master on Motions for Intervention, September 13, 1989	16

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

v. *Plaintiff-Intervenor,*

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF MARYLAND IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

On May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of this Court to resolve a controversy between Delaware and the State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed intangible personal property. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in Intervention, asserting claims to portions of the same unclaimed property and similar types of property. On October 12, 1989, Texas filed a Motion for Leave to File Amended Complaint in Intervention, and an Amended Complaint In

Intervention. On November 17, 1989, the States of California, Michigan, Nebraska, Ohio, and Rhode Island filed a Motion for Leave to File Complaint In Intervention asserting their claims to portions of this unclaimed property to which they are entitled. Other states have filed similar motions for leave to intervene. The State of Maryland now seeks leave to intervene and to join in the Complaint in Intervention of the States of California, Michigan, Nebraska, Ohio, and Rhode Island so that it may assert its claims to the portion of this unclaimed property to which the State of Maryland is entitled.

STATEMENT OF THE CASE

This original action concerns certain intangible property generated by securities transactions and by the payments of dividends, interest and principal in cases where the address of the rightful owner of the intangible property is unknown. New York, Delaware and Texas have asserted rights to the property based upon conflicting theories. The States of California, Maryland, Michigan, Nebraska, Ohio, and Rhode Island (the "Designated States) have asserted and are asserting their rights to the property distributed to the claimant states "in proportion to the commercial activities of their residents" as this Court sought in *Texas v. New Jersey*, 379 U.S. 674, 681 (1965). Specifically, the Designated States assert that, in the circumstances of this case, if the addresses of the beneficial owners are unknown, the Allocated Amount of Unclaimed Funds held by brokerage firms and other intermediaries attributable to corporate and governmental issues is subject to the claim of each state where the commercial activities occurred which gave rise to the Unclaimed Funds. Other states have aligned themselves with Texas ("Texas, *et al.*") or with a group of states led by Alabama ("Alabama, *et al.*"). Both Texas, *et al.*, and Alabama, *et al.*, have asserted the theory set forth in the Texas Complaint and Amended Complaint.

The accompanying Complaint in Intervention incorporates by reference the Complaint in Intervention filed by the States of California, Michigan, Nebraska, Ohio, and Rhode Island which fully sets forth the entitlement of the Designated States to their share of the unclaimed property at issue referred to as "Excess Receipts" and "Additional Excess Receipts" (collectively, "Unclaimed Funds") as defined in the complaints filed by the State of Texas and the Designated States which comes into being and acquires its character as unclaimed property in the context of securities transactions.

The relevant portions of the unclaimed property laws of the State of Maryland are cited in Exhibit A to the proposed Complaint in Intervention of the State of Maryland.

I.

THE APPLICANT MEETS THE REQUIREMENTS FOR INTERVENTION

Intervention is proper because the State of Maryland has satisfied the requirements for intervention set forth in Rule 24(a)(2) of the Federal Rules of Civil Procedure[2] as incorporated in Sup. Ct. R. 9.2,[3] and is therefore entitled to intervene as a matter of right. The disposition of this action is likely, as a practical matter, to impair the ability of the State of Maryland to protect its interest in the disputed property in the absence of its intervention as a plaintiff.

---

[2] Pursuant to Rule 24(a)(2), Fed. R. Civ. Pro., anyone who timely applies shall be permitted to intervene in the action:

> (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

[3] Rule 9.2 of the Supreme Court directs that the Federal Rules of Civil Procedure, "where their application is appropriate, may be taken as a guide to procedure in original actions."

By this intervention, the State of Maryland claims a portion of the specific unclaimed property which constitutes the subject matter of this action. While the precise amount of the unclaimed property claimed by the State of Maryland is presently unknown, on information and belief, the amount is substantial.

The State of Texas has been permitted to intervene in the instant case, and the Special Master appointed by this Court has stated his intention to recommend that motions of all states seeking to intervene in a timely manner be granted. *See, Report of the Special Master on Motions for Intervention,* September 13, 1989; *Litigation Management Order No. 1,* October 18, 1989, *as amended.*

Because the laws of the State of Maryland are not identical to those of the other states and because it and the other Designated States are asserting a position distinct from those of Delaware, New York, Texas, *et al.*, and Alabama, *et al.*, and because no other party can or will assert a claim to Maryland's Allocated share, the State of Maryland has interests which are not adequately represented by existing parties. In fact, the absence of the State of Maryland might bar it from asserting claims to property to which it might otherwise be entitled. The State of Maryland therefore should be permitted to intervene as a matter of right.

Alternatively, the State of Maryland should be permitted to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure as a matter of discretion.[4] Permissive intervention is appropriate because, without the intervention of the State of Maryland, matters involving issues of fact and law common to those presently in this lawsuit, and involving potentially hundreds of millions of dollars, will of necessity

---

[4] Pursuant to Rule 24(b), Fed. R. Civ. Pro., the Court may exercise its discretion and allow permissive intervention if an applicant's claim involves issues of fact or law common to those already present in the litigation and the intervention will not unduly delay or prejudice the adjudication of the rights of the existing parties.

be decided for the State of Maryland by implication and without a complete presentation of its point of view on the issues. Additionally, the facts which the State of Maryland will rely upon in order to support its claim are either already before the Court or will inevitably be developed during the course of these proceedings. Clearly, the claim of the State of Maryland to the unclaimed property at issue involves questions of law and fact common to those already present in this litigation.

Intervention by the State of Maryland's motion is timely in light of the October 18, 1989, ruling of the Special Master that prospective intervenors filing motions for leave to intervene beyond thirty days following October 18, 1989, would be permitted to join the same scheduling track as presently participating parties. *Litigation Management Order No. 1, supra.* The State of Maryland does not seek to interject a new theory of the case, but, rather to join in the Complaint in Intervention previously filed by the other Designated States and to join the Designated States in their efforts to obtain a favorable resolution of this litigation. Maryland expects to file jointly with the Designated States and its counsel already is participating in this case on behalf of two of the other plaintiff-intervenor States, Michigan and Ohio. Thus, the proceedings will not be delayed by the granting of this motion and the rights of the other parties will not be prejudiced.

II.

THIS COURT'S PRECEDENTS CALL FOR INTERVENTION IN THESE CIRCUMSTANCES

Intervention is proper under the principles established in *Western Union Telegraph Co. v. Pennsylvania,* 368 U.S. 71 (1961). In that case, the Court recognized the difficulties inherent in resolving controversies among different states over their respective rights to claim and take possession of unclaimed intangible personal property, and concluded that

the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.*, at 79. *See also, Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972) (both allowing intervention of additional states in unclaimed property cases).[5] The State of Maryland seeks by this Intervention an opportunity to so present its claims.

---

[5] In *Texas v. New Jersey*, leave for the State of Illinois to intervene was denied. Illinois claimed no interest in the property involved in the case. 379 U.S. at 677, n 6.

CONCLUSION

For the reasons state, the Motion of the State of Maryland for Leave to Intervene as a Plaintiff should be granted.

Respectfully submitted,

JAMES F. FLUG*
PAMELA B. STUART
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

J. JOSEPH CURRAN, JR.
Attorney General of Maryland
DENNIS M. SWEENEY
Deputy Attorney General
200 Saint Paul Place
Baltimore, Maryland 21202-2021
(301) 576-6300
SHELDON LASKIN
Assistant Attorney General
301 West Preston Street
Room 401
Baltimore, Maryland 21201
(301) 225-1561

*Counsel of Record
October 30, 1990

PROOF OF SERVICE

I, JAMES F. FLUG, certify that I am counsel of record for Plaintiff in Intervention, the State of Maryland, that I am a member of the Bar of the Supreme Court of the United States, and that on the 30th day of October, 1990, I served copies of the foregoing Motion for Leave to File Complaint in Intervention, on all parties required to be served by depositing such copies, first class postage prepaid, in the United States mail, addressed as follows:

Robert Abrams
Attorney General
State of New York
Department of Law
120 Broadway
New York, NY 10271

O. Peter Sherwood
Solicitor General
Department of Law
120 Broadway
New York, NY 10271

Roger A. Tellinghuisen
Attorney General of South Dakota
State Capitol
Pierre, SC 57501-5090

Janice L. Anderson
Deputy Attorney General
Commonwealth of Pennsylvania
15th Floor, Strawberry Square
Harrisburg, PA 17120

Ernest D. Preate, Jr.
Attorney General
Commonwealth of Pennsylvania
Strawberry Square, 16th Floor
Harrisburg, PA 17120

Burneatta L. Bridge
Assistant Attorney General of Wisconsin
Wisconsin Department of Justice
P.O. Box 7857
Madison, WI 53707-7857

George W. K. Snyder, Jr.
Assistant Attorney General
State of New Mexico
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Jim Mattox
Attorney General of Texas
Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

David A. Talbot, Jr.
Special Assistant
Attorney General
State of Texas
Supreme Court Building
P.O. Box 12548, Capitol Station
Austin, TX 78711-2548

Francis J. Lorson, Esq.
Chief Deputy Clert
U.S. Supreme Court
One First Street, NE
Washington, DC 20543

Charles M. Oberley, III
Attorney General of the State of Delaware
820 North French Street
Wilmington, DC 19801

Richard L. Suton, Esq.
Morris, Nichols, Arsht & Tunnell
1105 N. Market Street
P.O. Box 1347
Wilmington, DE 19899

E. Suzanne Darling
Assistant Attorney General
Commonwealth of Virginia
Office of the Attorney General
101 North Eighth Street
Richmond, VA 23219

Theodore V. Spangler, Jr.
Deputy Attorney General
State of Idaho
P.O. Box 36
Boise, ID 83722

Ian A. MacPherson
Assistant Attorney General
Department of Law
State of Arizona
1275 West Washington
Phoenix, AZ 85007

William J. Prensky
Asistant Attorney General
State of Connecticut
110 Sherman Street
Hartford, CT 06105

Michael W. Catalano
Deputy Attorney General
State of Tennessee
450 James Robertson Parkway
Nashville, TN 37219-5025

Lutz Alexander Prager
Assistant Deputy Corporation Counsel
Office of the Corporation Counsel
Room 305, District Building
Washington, DC 20004

Bernard Nash Esq.
Dickstein, Shapiro & Morin
2101 L Street, NW
Washington, DC 20037

Don Siegelman
Attorney General
State of Alabama
State House
11 South Union Street
Montgomery, AL 36130

Warren Price, III
Attorney General
State of Hawaii
State Capitol, Room 405
Honolulu, HI 96813

Neil F. Hartigan
Attorney General
State of Illinois
100 W. Randolph Street
12th Floor
Chicago, IL 60601

Linley E. Pearson
Atorney General
State of Indiana
219 State House
Indianapolis, IN 46204

Robert T. Stephan
Attorney General
State of Kansas
301 West Tenth Street
Judicial Center—Second Floor
Topeka, KS 66612

Frederic J. Cowan
Attorney General
Commonwealth of Kentucky
State Capitol, Room 116
Frankfort, KY 40601

William J. Guste, Jr.
Attorney General
State of Louisiana
22nd Floor, State Capitol
Baton Rouge, LA 70804

Marc Racicot
Attorney General
State of Montana
Justice Building
215 North Sanders
Helena, MT 59620

Brian McKay
Attorney General
State of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, NV 89710

Robert H. Henry
Attorney General
State of Oklahoma
Room 112
State Capitol Building
Oklahoma City, OK 73105

R. Paul Van Dam
Attorney General
State of Utah
236 State Capitol
Salt Lake City, UT 84114

Kenneth O. Eikenberry
Attorney General
State of Washington
Highways-Licenses Building
7th Floor, MS PB-71
Olympia, WA 98504

Douglas A. Johnson
Assistant Attorney General
State of North Carolina
Department of Justice
P.O. Box 629
Raleigh, NC 27602-0629

Carol Mullins
Assistant Attorney General
State of Colorado
General Legal Services Section
1525 Sherman Street, 2nd Floor
Denver, CO 80203

Gregory D. Huwe
Assistant Attorney General
State of Minnesota
Office of the Attorney General
1100 Bremer Tower
Seventh Pl. & Minnesota Street
St. Paul, MN 55101

Richard H. Forman
Solicitor General of Colorado
State Services Building
1525 Sherman Street
Denver, CO 80203

Yeoryios C. Apallas, Esq.
Deputy Attorney General
State of California
Department of Justice
350 McAllister Street
Room 6000
San Francisco, CA 94102

James F. Flug, Esq.
Lobel, Novins, Lamont & Flug
1275 K Street, NW
Suite 770
Washington, DC 20005

Andrew Quinn
State Public Administrator
Michigan Attorney General's Office
Third Floor, Plaza 1 Bldg.
401 S. Washington Square
Lansing, MI 48913

Robert J. Del Tufo
Attorney General
State of Jersey
Richard J. Hughes Justice Complex
CN080
Trenton, NJ 08625

Nicholas J. Spaeth
Attorney General
State of North Dakota
State Capitol
600 E. Boulevard Avenue
Bismarck, ND 58505

Joseph B. Meyer
Attorney General
State of Wyoming
123 State Capitol
Cheyenne, WY 82002

OTHERS

Andrew J. Connick, Esq.
Milbank, Tweed, Hadley & McCloy
1 Chase Manhattan Plaza
New York, NY 10005

Judith Welcom, Esq.
Brown & Wood
One World Trade Center
New York, NY 10048

Sheldon Laskin
Assistant Attorney General
301 W. Preston Street
Room 401
Baltimore, MD 21201

Robert Shuman
Office of the Controller
Capitol Bank of Commerce Bldg.
300 Capitol Mall
Suite 100, 18th Floor
Sacramento, CA 95814

Dale A. Comer
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920

Robin Feder
Assistant Attorney General
72 Pine Street
Providence, RI 02903

JAMES F. FLUG

Supreme Court, U.S.
FILED
JUN 3 1991
OFFICE OF THE CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF GEORGIA AND MAINE FOR LEAVE TO FILE COMPLAINT IN INTERVENTION; COMPLAINT IN INTERVENTION; AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

June 3, 1991

[State Attorneys General Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS GENERAL OF THE APPLICANTS FOR INTERVENTION

Michael J. Bowers, Attorney General
State of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

Michael E. Carpenter, Attorney General
State of Maine
State House
Augusta, Maine 04330
(207) 289-3661

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE STATES OF GEORGIA AND MAINE FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 17 of the Rules of the Supreme Court, the States of Georgia and Maine (hereinafter the "States"), sovereign states of the United States of America, by and through their Attorneys General and Special Counsel, move this Court for an order permitting them to intervene as Plaintiffs in the above-entitled case and permitting their proposed Complaint in Intervention, attached hereto, to be filed. In support of this motion, and as more fully set forth in the States' Brief in Support of Motion for Leave to File Complaint in Intervention, the States allege as follows:

I.

1. The States incorporate Paragraphs 1 through 9 of the Motion of the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia (hereinafter "Arkansas, *et al.*") for Leave to File Complaint in Intervention.

2. In Litigation Management Order No. 1, dated as of October 18, 1989, the Special Master established a discovery schedule and a timetable for the filing of Motions for Leave to Intervene by prospective intervenors. He stated that "[p]arties not meeting this timetable will be required, absent compelling reasons, to fit in to ongoing discovery and motions without disruption of that scheduling track" (¶ 8).

3. In Litigation Management Order No. 4, dated as of November 30, 1990, the Special Master granted the State of Maryland's motion for intervention, effective 15 days after the Supreme Court order referring the motion to him, "unless a party presently before the court files a memorandum in opposition to intervention prior to the expiration of that period after the referral." The Special Master stated that "[a]ny further applications for intervention referred to me by the Court during the pendency of the motions currently being briefed will be treated in the same fashion." Furthermore, "[a]ny state permitted to intervene during this period may participate in the ongoing briefing and argument as scheduled, and all future proceedings in the action," but will have no right to reopen the discovery period previously concluded.

4. The States' Complaint in Intervention is identical to the Complaint in Intervention filed by the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (hereinafter "Alabama, *et al.*"), the Complaint in Intervention filed by Arkansas, *et al.*, the Com-

plaint in Intervention filed by the States of New Jersey, North Dakota and Wyoming (hereinafter "New Jersey, *et al.*"), and the Complaint in Intervention filed by Alaska and Vermont. As referenced in the attached proposed Complaint in Intervention, the States seek a determination of their rights to certain unclaimed intangible personal property, as further described in Paragraphs 11 through 16 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention, which are adopted and incorporated herein.

5. The States' interests are not adequately represented by the original or intervening parties for the same reasons set forth in Paragraph 17 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention.

6. Intervention by the States will not delay the progress of this case, since the States are represented by the same counsel representing Alabama, *et al.*, Arkansas, *et al.*, New Jersey, *et al.* and Alaska and Vermont; they seek leave to file a Complaint in Intervention identical to that filed by Alabama, *et al.*, by Arkansas, *et al.*, by New Jersey, *et al.* and by Alaska and Vermont; and they agree to be bound by all proceedings held to date.

7. For the foregoing reasons, the States are entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure.

II.

8. Alternatively, the States adopt and incorporate herein Paragraphs 20 through 25 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention.

III.

9. The States also adopt and incorporate herein Paragraphs 26 and 27 of the Motion of Arkansas, *et al.* for Leave to File Complaint in Intervention.

10. Wherefore, the States pray that their Motion for Leave to File Complaint in Intervention be granted.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

Michael J. Bowers, Attorney General
State of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

Michael E. Carpenter, Attorney General
State of Maine
State House
Augusta, Maine 04330
(207) 289-3661

June 3, 1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

STATES OF GEORGIA AND MAINE,
Plaintiffs in Intervention,

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION OF THE STATES OF GEORGIA AND MAINE

The States of Georgia and Maine (hereinafter the "States"), Plaintiffs in Intervention, by and through their Attorneys General and Special Counsel, file this Complaint in Intervention and allege as follows:

1. The States incorporate by reference as though fully recited herein Paragraphs 1 through 8 and the Prayer for Relief of the Complaint in Intervention of the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New

Hampshire and West Virginia, save for substituting their names as Plaintiffs in Intervention in Paragraph 4.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

Michael J. Bowers, Attorney General
State of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

Michael E. Carpenter, Attorney General
State of Maine
State House
Augusta, Maine 04330
(207) 289-3661

June 3, 1991

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATES OF GEORGIA AND MAINE IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

The States of Georgia and Maine (hereinafter the "States"), by and through their Attorneys General and Special Counsel, hereby adopt and incorporate by reference as though fully recited herein, in support of their Motion for Leave to File Complaint in Intervention, the Brief filed with this Court on November 17, 1989, by the States of Arkansas, Florida, Iowa, Mississippi, Missouri, New Hampshire and West Virginia (hereinafter "Arkansas, *et al.*") in Support of their Motion for Leave to File Complaint in Intervention.

In Litigation Management Order No. 1, dated as of October 18, 1989, the Special Master established a discovery schedule and a timetable for the filing of Motions

for Leave to Intervene by prospective intervenors. He stated that "[p]arties not meeting this timetable will be required, absent compelling reasons, to fit in to ongoing discovery and motions without disruption of that scheduling track" (¶ 8).

In Litigation Management Order No. 4, dated as of November 30, 1990, the Special Master granted the State of Maryland's motion for intervention, effective 15 days after the Supreme Court order referring the motion to him, "unless a party presently before the court files a memorandum in opposition to intervention prior to the expiration of that period after the referral." The Special Master stated that "[a]ny further applications for intervention referred to me by the Court during the pendency of the motions currently being briefed will be treated in the same fashion." Furthermore, "[a]ny state permitted to intervene during this period may participate in the ongoing briefing and argument as scheduled, and all future proceedings in the action," but will have no right to reopen the discovery period previously concluded.

The States' motion should be granted for the reasons set forth in the Brief of Arkansas, *et al.* Intervention by the States will not delay the progress of this case, since the States are represented by the same counsel representing the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania (hereinafter "Alabama, *et al.*"), Arkansas, *et al.*, the States of New Jersey, North Dakota and Wyoming (hereinafter "New Jersey, *et al.*") and the States of Alaska and Vermont; they seek leave to file a Complaint in Intervention identical to that filed by Alabama, *et al.*, by Arkansas, *et al.*, by New Jersey, *et al.* and by Alaska and Vermont; and they agree to be bound by all proceedings held to date.

CONCLUSION

For the reasons stated, the Motion of the States of Georgia and Maine for Leave to File Complaint in Intervention should be granted.

Respectfully submitted,

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
LESLIE R. COHEN
JUDITH E. SCHAEFFER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Applicants for Intervention

Michael J. Bowers, Attorney General
State of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

Michael E. Carpenter, Attorney General
State of Maine
State House
Augusta, Maine 04330
(207) 289-3661

June 3, 1991

No. 111 Original

MOTION FILED
AUG 29 1991

In the Supreme Court of the United States

OCTOBER TERM, 1990

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

STATE OF OREGON,

Applicant for Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF OREGON FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

DAVE FROHNMAYER
Attorney General of Oregon
JACK L. LANDAU
Deputy Attorney General
*VIRGINIA L. LINDER
Solicitor General
DONALD C. ARNOLD
Chief Counsel
General Counsel Division
WILLIAM R. COOK
Assistant Attorney General
400 Justice Building
Salem, Oregon 97310
Phone: (503) 378-4402
Counsel for State of Oregon

*Counsel of Record

In the Supreme Court
of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

STATE OF OREGON,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF OREGON FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT AND BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

Pursuant to Rule 9 of the Rules of the Supreme Court, the State of Oregon, a sovereign State of the United States of America, by and through its Attorney General, Dave Frohnmayer, moves the Court for an order permitting it to intervene in the above-entitled cause, and permitting it to adopt, to the extent appropriate, the amended complaint in intervention filed by the State of Texas,

Plaintiff in Intervention. In support of this motion, the State of Oregon would show the Court as follows:

I.

1. On or about May 31, 1988, the Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which State is entitled to claim and take possession of certain unclaimed intangible personal property, consisting of monies and other intangible property, described as "excess receipts" by the Plaintiff in Intervention State of Texas ("Texas") in its complaint in intervention and held or formerly held by securities brokerage houses incorporated in Delaware and demanded by or remitted to New York.

2. On December 12, 1988, Thomas H. Jackson, Esquire, was appointed Special Master in this case.

3. On February 21, 1989, the Court granted the motion of Texas to intervene and file its complaint in intervention in this case. Subsequently, the Court further granted the motion of Texas to file an amended complaint.

4. As set forth in its amended complaint, Texas claims the right to custodial possession of a portion of the excess receipts that constitute the subject matter of the original controversy between Delaware and New York, specifically, that portion of excess receipts held or formerly held by securities brokerage houses incorporated in Delaware that are attributable to issuers incorporated in Texas.

5. Texas also claims the right to custodial possession of certain additional excess receipts, consisting of excess receipts attributable to issuers incorporated in Texas held or formerly held by the Depository Trust Company and additional excess receipts that have arisen in connection with distributions made by Texas municipal

and other governmental issuers that are now being demanded by or remitted to New York. It is the understanding of the State of Oregon ("Oregon") that the Court may consider claims to both the excess receipts originally at issue and the additional excess receipts identified by Texas.

6. Texas claims that, if the identity of the beneficial owner is unknown, the excess receipts and additional excess receipts should be remitted to the State of incorporation of the issuer under that State's unclaimed property law.

7. Oregon claims a portion of the excess receipts and additional excess receipts at issue in this action, specifically, that portion of the excess receipts and additional excess receipts attributable to issuers incorporated in Oregon and that portion attributable to Oregon counties, municipalities, and other governmental entities.

8. The amount of excess receipts and additional excess receipts that Oregon is entitled to claim is currently unknown. Oregon has never, prior to this lawsuit, had any reason to identify and quantify such excess receipts and additional excess receipts. However, it is probable that at least one issuer incorporated in Oregon has generated excess receipts and additional excess receipts. Moreover, it is a virtual certainty that bonds issued by Oregon counties, municipalities and other governmental entities have generated additional excess receipts subject to the claim of Oregon.

9. Oregon asserts its claim pursuant to Oregon Revised Statutes 98.302 *et seq.*, which provides, in essence, for the custodial taking of tangible and intangible personal property that is held in the ordinary course of the holder's business and has remained unclaimed by the owner for a period of five years.

10. Oregon supports and adopts, as if fully set forth in these pleadings, Texas' amended complaint in intervention and the factual and legal arguments set forth therein, to the extent the same are

applicable and relevant to the claims of Oregon set forth in Paragraphs 7-9.

11. Although Oregon adopts the amended complaint in intervention filed by Texas, it is essential that Oregon be permitted to intervene in its own right in this proceeding. The decision of the Court will establish a rule of law that will conclusively determine the future right of Oregon to take possession of unclaimed property similar or identical in nature to the property at issue herein. As a party, Oregon can obtain a ruling from the Court recognizing its right to take possession of specific unclaimed property pursuant to its unclaimed property laws and ordering New York to tender such property to Oregon.

12. Oregon's motion is timely in light of all the circumstances. Motions to intervene by 24 States are pending, and the special master is expected to recommend that the Court grant applications of all jurisdictions that have filed motions to intervene before September 1, 1991. Moreover, the special master has not yet filed his report with the Court. Therefore, intervention by Oregon will not delay the progress of this case.

13. Based on the foregoing, Oregon is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure. Alternatively, Oregon urges the Court to exercise its discretion and grant the requested intervention pursuant to Rule 24(b).

14. The intervention of Oregon in this action will not unduly delay these proceedings or prejudice the adjudication of the rights of the present parties. To the extent that it can do so, Texas has offered to coordinate the effort among those States wishing to intervene and represent themselves in this case. The addition of Oregon as a plaintiff in intervention will not result, therefore, in an unmanageable increase in the number of parties to this litigation.

II.

15. The Court, in *Western Union Telegraph Company v. Pennsylvania*, 368 U.S. 71 (1961), recognized the difficulties inherent in resolving controversies among the States over their respective rights to take possession of unclaimed intangible personal property, and concluded that the United States Supreme Court was the appropriate forum in which "all the states that want to do so can present their claims for consideration and final, authoritative determination." *Id.* at 79. *See also*, *Pennsylvania v. New York*, 407 U.S. 206 (1972). It is such an opportunity that Oregon seeks by urging this Court to grant leave to intervene.

Wherefore, Oregon prays that it be permitted to intervene as a party plaintiff in this case, and to adopt, as its own and as if fully set forth, Texas' amended complaint in intervention, and the factual and legal arguments set forth therein, to the extent the same are relevant and applicable to the claims of Oregon, or alternatively prays that it be permitted to file its own complaint in intervention setting forth the factual and legal arguments asserted by Texas in its amended complaint and seeking, on behalf of Oregon, relief of the same nature as Texas.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon

VIRGINIA L. LINDER
Solicitor General
400 Justice Building
Salem, Oregon 97310
(503) 378-4402

In the Supreme Court
of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

STATE OF OREGON,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF OREGON IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

TABLE OF CONTENTS

Page

Jurisdiction 2

Statement of the Case 2

Summary of Argument 3

Argument

I. Oregon is entitled to intervene as a matter of right pursuant to Rule 24(a)(2), Federal Rules of Civil Procedure, and the standards established in *Texas v. New Jersey*, 379 U.S. 674 (1965) 4

II. In the alternative, permissive intervention is appropriate pursuant to Rule 24(b), Federal Rules of Civil Procedure 5

Conclusion 5

TABLE OF AUTHORITIES

Page

Cases Cited

Pennsylvania v. New York, 407 U.S. 206 (1972) 2
Texas v. New Jersey, 379 U.S. 674 (1965) 2,3,4,5

Constitutional Provisions

Constitution of the United States, Article III, Section 2 2

Statutory Provisions

United States Code Title 28, Section 1251(a) 2

Administrative Provisions

Fed. R. Civ. P. 24 4
Fed. R. Civ. P. 24(a)(2) 3,4
Fed. R. Civ. P. 24(b) 3,5
U.S. Sup. Ct. R. 9.2 4

In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff in Intervention,

STATE OF OREGON,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF OREGON IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE AND ADOPT COMPLAINT

On February 21, 1989, the Court granted the motion of Plaintiff in Intervention State of Texas ("Texas") to intervene and file its complaint in intervention in this case. Subsequently, the Court further granted the motion of Texas to file an amended complaint. Texas claims a portion of the unclaimed property at issue as well as additional unclaimed property that is of the same nature and arises in the same way as the property already at issue.

The State of Oregon ("Oregon") also claims a portion of the original property and the additional property at issue in this case. Oregon seeks leave to intervene as a plaintiff in this suit and to adopt the amended complaint previously filed by Texas.

JURISDICTION

The Court has accepted the original jurisdiction of this action pursuant to Article III, Section 2 of the Constitution of the United States and under United States Code Title 28 Section 1251(a).

STATEMENT OF THE CASE

The State of Oregon asks leave to intervene in this action, adopting the amended complaint filed by the State of Texas, Plaintiff in Intervention, as its own. That complaint and the motion for leave to intervene filed by Oregon set forth the character of the property at issue and the entitlement of Oregon, Texas, and the remaining States to claim a portion of that property. Generally, the property consists of excess receipts and additional excess receipts, as described by Texas in its complaint in intervention. These receipts result from the system of securities trading, involving brokerage firms incorporated in Delaware and other States and trading in New York and the Depository Trust Company, a New York corporation. The owner of the property at issue is unknown, and the property itself has become abandoned. Under current practice, the property is held for three years and then remitted to the State of New York.

The parties to this action all claim the property, or a portion thereof, pursuant to the rules of priority established by this Court in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). The parties differ, however, in their characterization of the unclaimed property and to whom it is owed. As a result, each party has a different theory of who is the "owner" and who is the "holder" of the property. Delaware's position is that the unclaimed property results from a debt owed by

brokers incorporated in Delaware to beneficial owners whose addresses are unknown. Under this theory, all the property escheats to Delaware as the State of incorporation of the "holders." New York claims that the property results from a debt owed by brokers to other brokers and banks which, for the most part, have trading addresses in New York. Under this theory, all the property escheats to New York as the State of last known address of the "holders." Texas takes the position that the unclaimed property is a result of a debt owed by the issuer of the security to the beneficial owner. If the address of the beneficial owner is unknown, the property goes to the "issuer's" State of incorporation. Under this theory, all 50 States share in the distribution of the property. Oregon supports the Texas theory and seeks leave to intervene and to adopt the Texas amended complaint as its own.

SUMMARY OF ARGUMENT

I. Oregon claims the right to custodial possession of portions of the property that is the subject of this suit and satisfies the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and the standards set out in *Texas v. New Jersey*. Oregon is entitled to intervene as a matter of right.

II. Oregon claims an interest in the property that is the subject of this suit, and the intervention of Oregon will not unduly delay this action or prejudice the rights of the original parties. Having satisfied the requirements for permissive intervention pursuant to Rule 24(b) of the Federal Rules of Civil Procedure, Oregon's motion for leave to intervene should be granted.

ARGUMENT

I. OREGON IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO RULE 24(a)(2), FEDERAL RULES OF CIVIL PROCEDURE AND THE STANDARDS ESTABLISHED IN *TEXAS V. NEW JERSEY*, 379 U.S. 674 (1965).

Rule 9.2 of the Rules of the Supreme Court provides that "[t]he form of pleadings and motions in original actions shall be governed, so far as may be, by the Federal Rules of Civil Procedure, and in other respects those Rules, where their application is appropriate, may be taken as a guide to procedure in original actions in this Court." Rule 24 of the Federal Rules of Civil Procedure governs intervention generally. That rule provides that anyone who applies in a timely manner shall be permitted to intervene in an action:

> [W]hen the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Fed. R. Civ. P. 24(a)(2).

Oregon should be allowed to intervene as a matter of right. Oregon claims an interest in the property that is the subject of this action—specifically all excess receipts that were issued by corporations domiciled in Oregon and all additional excess receipts that were issued by Oregon domiciliaries and governmental entities. Although the amount of property subject to claim by Oregon is difficult to estimate, it is both substantial and sufficient to entitle Oregon to intervene as a matter of right.

In the case of *Texas v. New Jersey*, this Court set a standard allowing any State that claimed an interest in the subject property

to intervene in original actions involving unclaimed property. Because it claims a significant interest in the excess receipts and additional excess receipts at issue in this case, Oregon has satisfied the test of *Texas v. New Jersey* and should be allowed to intervene.

The Court's decision in this case will determine Oregon's rights to the property at issue in this case. It is, therefore, important that Oregon be allowed to intervene and to participate in the discovery process to identify the specific property to which it is entitled. Although Oregon seeks to adopt the Texas amended complaint, it is also important that Oregon be allowed to advocate its own claim before the Court.

The standards for intervention as a matter of right have been satisfied, and Oregon should be granted leave to intervene.

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 24(b) of the Federal Rules of Civil Procedure gives the Court discretion to allow permissive intervention where appropriate. As a sovereign State with a substantial interest in the outcome of this litigation, Oregon should be allowed to intervene. Oregon does not seek to interject a new theory of the case, but, rather, to join in the Texas amended complaint and to coordinate its efforts with Texas toward the ultimate resolution of this litigation. It is apparent, therefore, that intervention by Oregon will not unduly delay this action or prejudice the rights of the original parties. Oregon has satisfied the standards for permissive intervention and the Court should exercise its discretion to allow Oregon to intervene.

CONCLUSION

For all these reasons, the motion of the State of Oregon for leave to intervene as a plaintiff in this action and to adopt the amended complaint filed by the State of Texas should be granted.

In the alternative, Oregon should be granted leave to intervene and permitted to file its own complaint in intervention.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
JACK L. LANDAU
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
DONALD C. ARNOLD
Chief Counsel
General Counsel Division
WILLIAM R. COOK
Assistant Attorney General
Counsel for Applicants for
Intervention

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

(39)

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

vs.

STATE OF NEW YORK,

Defendant.

EXCEPTIONS OF THE STATE OF NEW YORK TO THE REPORT OF THE SPECIAL MASTER

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

May 26, 1992

BEST AVAILABLE COPY

QUESTIONS PRESENTED

In *Texas v. New Jersey*, 379 U.S. 674 (1965), the Court announced rules to determine the States' priority in escheating or taking custodial possession of abandoned intangible property such as debts. The right and power to escheat the debt is accorded to the State of the creditor's last known address as shown by the debtor's books and records (the primary rule). 379 U.S. at 681-682. Where there is no last known address, or where the State of last known address does not, at the time in question, provide for escheat of the property, the State of the debtor's domicile shall take the property, subject to the right of the State of last known address to recover it if and when its law makes provision for the escheat (the backup rule). *Id.* at 682. The questions raised in this case concern the application of the Court's escheat rules.

1. Under the *Texas v. New Jersey* backup rule, is New York entitled to custody of the unclaimed dividend and interest overpayments held by the Depository Trust Company and New York custodian banks, entities domiciled in New York whose books and records do not identify a creditor of the property?

2. Under the *Texas v. New Jersey* primary rule, is New York entitled to custody of dividend and interest overpayments abandoned by creditor brokers with New York addresses on the books and records of debtor brokers in New York?

3. Should the changes in the *Texas v. New Jersey* rules proposed by the Report of the Special Master be implemented prospectively if adopted by the Court, or New York's retroactive monetary liability be subject to remedial limitation?

PARTIES

The parties to the action are listed in the caption. The intervention motions of the 47 remaining States and the District of Columbia are pending before the Court.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES	ii
EXCEPTIONS	1
JURISDICTION	2
STATUTE INVOLVED	2
STATEMENT OF THE CASE	3
I. INTRODUCTION	3
II. THE *TEXAS V. NEW JERSEY* RULE	8
A. The Court's Concerns For Fairness And Ease Of Administration Are Embodied In The Creditor's Last Known Address Provision Of The *Texas* Primary Rule	8
B. The Court Looked To The Debtor's Domicile For A Rule Of Certainty When The Creditor's Last Known Address Provision Could Not Be Applied	12
C. The Court Refused To Carve Out An Exception To The *Texas v. New Jersey* Rule Based Upon The Facts Of A Particular Case	12
III. THE EVIDENTIARY RECORD	17
A. The Depository Trust Company	22
B. Custodian Banks	26
C. Brokerage Firms	29
IV. THE REPORT OF THE SPECIAL MASTER	34
A. Overview	34

Page

B. The Legal Analysis 37

a. The Dual Debtor Conundrum 37

b. The Ultimate Beneficial Owner As Creditor 40

C. The California, *et al.* Theory 42

D. Reachback Period 43

SUMMARY OF ARGUMENT 44

ARGUMENT 49

POINT I - THE RECORD HOLDER IS THE DEBTOR OF THE PROPERTY IN QUESTION UNDER THE *TEXAS V. NEW JERSEY* BACKUP RULE 49

A. The Court's Precedents Consistently Apply The Term Debtor To The Obligor Or Holder Of Abandoned Intangible Property 50

B. The Special Master's Novel Definitions Of The Debtors And Creditors Is Also Contrary To The Uniform Abandoned Property Acts And The States' Abandoned Property Laws 56

C. The Uniform Commercial Code's Definition Of The Debtors And Creditors Of The Property In Question Conforms With The Court's Escheat Precedents And State Escheat Laws 60

Page

D. The Special Master Rejected State Law For Reasons That Are Contrary To The Court's Precedents And The Evidentiary Record 69

E. The Special Master's Ultimate Rejection Of State Law Is Based Upon The Impermissible Ground That It Does Not Result In A Dispersal Of The Funds To All The States 71

POINT II - THE CREDITOR OF THE PROPERTY IN QUESTION UNDER THE *TEXAS V. NEW JERSEY* PRIMARY RULE IS THE OWNER IDENTIFIED BY THE DEBTOR'S BOOKS 74

A. The Court Did Not Make Escheat Under The *Texas v. New Jersey* Primary Rule Contingent Upon Identifying The Ultimate Intended Beneficial Owners Of The Property 75

B. Creditor Brokers And Banks On the Debtor Brokers' Records Are The Creditors Under The *Texas v. New Jersey* Primary Rule 77

C. New York Has Raised A Question Of Fact Concerning The Identification Of The Creditors 79

POINT III - THE REPORT OF THE SPECIAL MASTER, IF ADOPTED, SHOULD BE PROSPECTIVELY IMPLEMENTED 82

A. The Retroactivity Issue Should Be Determined With Regard To The Court's Original Rule-Making Jurisdiction 83

Page

B. The *Chevron Oil* Test 83

1. New Principles Of Law 84

2. The Merits Of Prospective Operation 86

3. Weighing The Equities 89

CONCLUSION 93

TABLE OF AUTHORITIES

CASES	Page
American Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073 (1983)	86
American Trucking Associations, Inc. v. Smith, 496 U.S. 167 (1990)	*passim*
Anderson Nat. Bank v. Luckett, 321 U.S. 233 (1944)	49, 54, 55
Baldwin v. Missouri, 281 U.S. 586 (1930)	11
Barbato v. Breeze Corp., 128 N.J.L. 309, 26 A.2d 53 (1942)	61
Blodgett v. Silberman, 277 U.S. 1 (1928)	11
Burks v. Lasker, 441 U.S. 471 (1979)	64
Chevron Oil v. Huson, 404 U.S. 97 (1971)	*passim*
Columbia Water Power Co. v. Columbia Elec. St. Ry. Co., 172 U.S. 475 (1898)	64
Connecticut v. Massachusetts, 282 U.S. 660 (1931)	64
Davis v. Fraser, 307 N.Y. 433, 121 N.E.2d 406 (1954)	61
Farmers Loan & Trust Co. v. Minnesota, 280 U.S. 204 (1930)	11
Florida v. Long, 487 U.S. 223 (1988)	86
Goodman v. Lukens Steel Co., 482 U.S. 656 (1987)	90

	Page
Greasy Brush Coal Co. v. Hays, 292 Ky. 517, 166 S.W.2d 983 (1942)	61
Griffith v. Kentucky, 479 U.S. 314 (1987)	84
Hazelwood School District v. United States, 433 U.S. 299 (1977)	81
Hernandez v. Texas, 347 U.S. 475 (1954)	81
Homestake Oil Co. v. Rigler, 39 F.2d 40 (9th Cir. 1930)	61
International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977)	81
James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991)	83, 88, 89, 90
Lemon v. Kurtzman, 411 U.S. 192 (1973)	90
Mallard v. United States District Court, 490 U.S. 296 (1989)	64
Martin v. Hunter, 1 Wheat (14 U.S.) 304 (1816)	64
McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18 (1990)	89
McLaren v. Crescent Planing Mill Co., 117 Mo. App. 40, 93 S.W. 819 (1906)	61
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989)	64
Munro v. Mullen, 100 N.H. 128, 121 A.2d 312 (1956)	61

	Page
Old Colony R. Co. v. Commissioner of Internal Revenue Service, 284 U.S. 552 (1931)	64
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Searles v. Gebbie, 115 A.D. 778, 101 N.Y.S. 199 (4th Dep't 1906)	61
Security Savings Bank v. California, 263 U.S. 282 (1923)	50, 54, 55
Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951)	*passim*
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*
Turner v. Fouche, 396 U.S. 346 (1970)	81
United States v. Kimbell Foods, Inc., 440 U.S. 715 (1979)	64
Western Union Telegraph Co. v. Pennsylvania, 368 U.S. 71 (1961)	9, 13, 14
Woolford Realty Co. v. Rose, 286 U.S. 319 (1931)	64
FEDERAL CONSTITUTIONAL AND STATUTORY PROVISIONS	
United States Constitution: Article III, Section 2	2
United States Code:	
Section 1251(a) of Title 28	2
Section 2501, *et seq.*, of Title 12	43

	Page
Section 2501(1) of Title 12	43
Section 2501(2) of Title 12	43
Section 2503(1) of Title 12	43
Section 2503(2) of Title 12	43
Section 2503(3) of Title 12	43
Securities Exchange Act of 1934	5
Rule 13d-3	5
Rule 13d-4	5
Rule 16	5
STATE STATUTORY PROVISIONS:	
N.Y. Aband. Prop. Law (2 1/2 McKinney's Cons. Laws of N.Y. 1991), § 102	2
N.Y. Aband. Prop. Law § 300	2
N.Y. Aband. Prop. Law § 300(e)	2
N.Y. Aband. Prop. Law § 300(h)(i)	2, 3
N.Y. Aband. Prop. Law § 510-514	2
N.Y. Aband. Prop. Law § 510(7)	2
N.Y. Aband. Prop. Law § 511	2
N. Y. State Finance Law (55 McKinney's Cons. Laws of N.Y. 1989), § 95	44, 90
Texas Code Anno., Property, § 72.001.	60

Page

UNIFORM AND MODEL STATUTES

Uniform Commercial Code § 8-207 45

Uniform Commercial Code § 8-207(1) ..... *passim*

Uniform Aband. Prop. Act of 1981 57

Uniform Aband. Prop. Act of 1981, §1(2) 59

Uniform Aband. Prop. Act of 1981, § 1(8) 58

Uniform Aband. Prop. Act of 1981, § 2 57

Uniform Aband. Prop. Act of 1981, § 3 57

Uniform Aband. Prop. Act of 1981, § 12 58

Uniform Disposition of Unclaimed Prop. Act of 1954 (rev. 1966) 59

Uniform Disposition of Unclaimed Prop. Act of 1954 (rev. 1966), § 1(d) 59

OTHER AUTHORITIES

11 Fletcher Cyclopedia of the Law of Private Corporations (Rev. ed. L. Zajdel ed. 1986) 61, 62

1 G. Hornstein, Corporation Law and Practice (1959) 61

2A Sutherland Statutory Construction (6th ed. 1992) 64

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

EXCEPTIONS OF THE STATE OF NEW YORK TO THE REPORT OF THE SPECIAL MASTER

EXCEPTIONS

The defendant State of New York, by Robert Abrams, Attorney General of the State of New York, excepts to the Report of the Special Master dated January 28, 1992, heretofore filed with the Court, insofar as it concluded that New York's escheat of the abandoned property at issue conflicts with *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972), and recommended the imposition of retroactive monetary relief, and in support of such exceptions respectfully submits the following brief.

JURISDICTION

The original jurisdiction of the Court is invoked under Article III, Section 2 of the Constitution of the United States, and under United States Code, Title 28, Section 1251(a).[1]

STATUTE INVOLVED

New York's current Abandoned Property Law is the product of a general codification in 1943 of then existing law. In adopting it, the Legislature declared that it was "the policy of the state, while protecting the interest of the owners thereof, to utilize escheated lands and unclaimed property for the benefit of all the people of the state." N.Y. Aband. Prop. Law § 102 (2½ McKinney's Cons. Laws of N.Y. 1991). Thus, the policy of the State is custodial protection, not confiscation.[2] The Abandoned Property Law includes provisions specifically applying to unclaimed property held by securities brokers or dealers (N.Y. Aband. Prop. Law §§ 510-514) (article V-A), and by banking organizations organized under or subject to the laws of New York. N.Y. Aband. Prop. Law § 300 (article III). In the case of securities brokers or dealers, the property includes any dividends, profits, or other distributions, paid in stock or cash, and any interest or other payment or principal held by brokers or dealers which remain unclaimed for three years. N.Y. Aband. Prop. Law §§ 510(7), 511. The unclaimed property held by banking organizations includes any amount or security representing a dividend or other payment on any stock, bond or other security of a corporation or governmental issuer which remains unclaimed for three years. N.Y. Aband. Prop. Law § 300(e).[3]

---

[1] The Court appointed Thomas H. Jackson, Dean of the University of Virginia Law School, as Special Master, on December 12, 1988. 488 U.S. 990.

[2] The Report of the Special Master noted that these proceedings technically involve "custodial taking," not escheat. Report at 2, n.1. It added, however, that continued reference to "escheat" law was appropriate for resolution of the issues under *Texas v. New Jersey*, 379 U.S. 674 (1965).

[3] If the banking organization holds the property as the issuer's agent, the statute provides coverage only if the property is payable to a New York resident. N.Y. Aband. Prop. Law § 300(h)(i). Since the issuer remains the debtor in this

(Footnote continued)

STATEMENT OF THE CASE

I. INTRODUCTION

The resolution of the competing claims in this action is governed by the Court's precedents in *Texas v. New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania v. New York*, 407 U.S. 206 (1972). Although New York takes issue with the Report of the Special Master over certain facts in the evidentiary record, the application of the Court's escheat precedents to this case devolves upon clear legal principles which the Master misinterpreted.

In *Texas v. New Jersey*, the Court recognized the necessity for a "clear rule" to govern the escheat of abandoned intangible property, to be applied to "all types of intangible obligations" and "to which all States may refer with confidence." *Texas v. New Jersey*, 379 U.S. at 678. The rule announced by the Court is that jurisdiction to escheat abandoned intangible property lies in the State of the creditor's last known address on the debtor's books and records (the primary rule); if the creditor's address does not appear on the debtor's books (is unknown), or is in a State that does not provide for escheat of the property in question, then the State of the debtor's incorporation may take the funds, subject to the right of the State of last known address to recover it upon proof that the creditor's last known address is within its borders, or when its law makes provision for escheat of such property (the backup rule). 379 U.S. at 681-682. Thus, central to the application of the Court's escheat rules in a particular case is the identification of the debtors and creditors of the abandoned intangible property.

The present case was commenced in 1988,* approximately twenty-three years after the Court proclaimed the creditor-debtor rule in *Texas v. New Jersey*, and some sixteen years after

---

circumstance, its domicile has the right to escheat the property owed to unknown creditors. Section 300(h)(i) originally applied only to the distributions of corporate issuers. A recent amendment added coverage for the distributions of governmental issuers owed to New York residents. L. 1989, c.61, § 262, effective April 19, 1989.

* The Court granted the State of Delaware's motion for leave to file a complaint against the State of New York on May 31, 1988. 486 U.S. 1030.

it decided *Pennsylvania v. New York*. In the latter case, the Court rejected a bid to vary the rule when the debtor did not regularly record the addresses of its creditors, notwithstanding the fact that this business practice altered the anticipated operation of the rule by "[making] the debtor's domicile the primary recipient of unclaimed intangibles." 407 U.S. at 214. The Court used this opportunity to reiterate its refusal " 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever - developing new categories of facts.' " *Pennsylvania v. New York*, 407 U.S. at 215 (citing *Texas v. New Jersey*, 379 U.S. at 679).

The Court is now being asked, once again, to reconsider the rule in *Texas v. New Jersey* as applied to a different type of intangible obligation. The unclaimed property in this case consists of dividend and interest distributions on underlying equity (stock) and debt (bond) issues, as well as stock dividends. The issuers of the underlying securities declare these distributions and pay them to the stockholders or bondholders of record who are registered on the issuer's books and records as the owners of the securities.

The stockholders or bondholders of record, also called the registered owners or record holders, are typically brokerage firms, custodian banks and securities depositories.[5] They hold the underlying securities in a variety of different ways. In some cases, brokers and banks are themselves the beneficial owners. More often, however, the broker or bank has an arrangement with its customer to own the securities in its nominee or street name on behalf of the customer, who is the beneficial owner. If the broker and bank participate in the depository system, the depository functions as its agent to receive distributions from the issuers or their paying agents.[6] The depository is then the

---

[5] The registered owner of a security may also be an individual, in which case the issuer will pay the distribution directly to that person.

[6] In most instances, the issuer hires a paying agent to pay the dividend, interest or other declared distribution. Paying agents, also called disbursing

(Footnote continued)

registered owner in its nominee name. Only property held by New York brokers and banks and The Depository Trust Company (DTC), a New York domiciled securities depository, is at issue in this case. The property held by registered owners in other States escheats to those States according to the same understanding of the *Texas* rules that New York has relied on.

The issuer of the securities is not a party to the arrangement between the registered owner and its customer. In fact, the identity of the customer is often known only to the registered owner, although it may be known to the issuer as well. The customer may not even be the ultimate beneficial owner but may be acting for someone else. There is no standard format for ownership and the attributes of beneficial ownership may be divided among more than one person or entity. The highly variable nature of beneficial ownership is reflected in the complex Federal securities regulations that attempt to define it. *See, e.g.*, Rules 13d-3 ("Determination of Beneficial Owner"), 13d-4 ("Disclaimer of Beneficial Ownership") and 16a-1(a) (definition of "beneficial owner" for purpose of Section 16) under the Securities Exchange Act of 1934. Record ownership, on the other hand, is simple - the person or entity whose name appears on the issuer's books is the registered owner.

When the registered owner is not the beneficial owner of a security, it has an obligation to pay distributions to the entity or person on whose behalf it is acting. At this stage, the issuer is no longer involved because its payment to the registered owner discharges its obligation. Uniform Commercial Code (U.C.C.) § 8-207(1). Banks and brokers employ an automatic payment procedure to pay their customers. Payment is based upon the customer's ownership position in the security regardless of the amount of the distribution which the broker or bank receives from the issuer or depository. Thus, if a broker or bank is

---

agents, are usually banking institutions with whom the issuer contracts to perform this service. Issuers also employ transfer agents (or registrars in the case of bond issues) to maintain accurate and up-to-date records of the names and addresses of the registered owners.

underpaid, that entity, not the beneficial owner, sustains the loss. The beneficial owner's right to the distribution is routinely satisfied.

When a registered owner receives an overpayment, that property will be subject to escheat if it remains unclaimed for a period of time, determined by the dormancy period of the escheating jurisdiction. Determining the correct escheating jurisdiction requires the application of the *Texas v. New Jersey* escheat rules. The rules require no more than the identification of the jurisdiction of the creditor's last known address from the debtor's books and records, and in the absence of that information, the domicile of the debtor.

The identification of the debtor and creditor in this case can be accomplished by applying the commercial law principles of the Uniform Commercial Code, § 8-207(1), which all 50 States and the District of Columbia have adopted. These principles have also been incorporated by the States into their own abandoned property statutes.[7] Pursuant to this uniform body of commercial and escheat law, the debtors of the property in question are the registered owners after the issuer has made payment and discharged its debt under state law. Thus, New York escheats the property held by DTC and New York custodian banks under the *Texas* backup rule because these debtor entities are domiciled here and it is undisputed that their books do not identify a creditor of the property.

Under the *Texas* primary rule, the creditor must be determined from the books and records of the debtor, which is the registered owner under state law.[8] New York contends that unlike DTC

---

[7] Since the commencement of this lawsuit, a number of States have amended their abandoned property laws to conform to the theory advanced by Texas, *et al.* and Alabama, *et al.*, that the issuer is the debtor even after it has paid the distribution to the shareholder of record. *See* p. 60, *post*.

[8] The Report of the Special Master also specified that the books of the record owners be examined to determine if the creditor's jurisdiction can be identified, notwithstanding the Report's conclusion that the issuer is the debtor. *See* Report at A-3.

and custodian banks, brokers do record the last known addresses of their creditors, which correspond to the brokers and banks that were underpaid the distributions on which the debtor brokers were overpaid. The creditor broker or bank is the apparent owner of the distribution on the debtor broker's books. Again, most States' abandoned property laws are modeled on the uniform abandoned property acts, which interpret the creditor's last known address provision of the *Texas* primary rule as applying to the apparent owner of the property on the debtor's books and records.

The Report of the Special Master[8] concluded that the issuer of the underlying security remains the debtor even after it has discharged its debt by paying the distribution to the registered owner. In order to reach this conclusion, the Special Master stated that the *Texas* rules were really concerned with identifying debtor and creditor "attributes." For the same reason, the Special Master concluded that the creditors of the property in question are the "ultimate intended beneficial owners," not the creditors identified on the debtor's books as the primary rule requires. Thus the Court's clear escheat rules, imbued with the threshold fairness of recognizing the primacy of the creditor through its last known address and the convenience of using the debtor's domicile as a backup, have been changed and rendered uncertain.

In addition, the identification of the creditor as the ultimate intended beneficial owner cuts off escheat rights that would be valid even under the Special Master's formulation of the primary rule. The evidentiary record established that creditor brokers and banks have beneficial ownership interests in the property because they pay their customers all of the distributions to which they are entitled. The loss resulting from the underpayment of a distribution is sustained by the creditor broker or bank unless it asserts a claim against the debtor broker that was overpaid.

The Special Master's reliance upon the ultimate beneficial owner as the creditor under the *Texas* primary rule pretermitted

New York's factual contention that it is the State of last known address of almost all creditor brokers and banks on the books of debtor brokers in New York. Accordingly, New York was not given the opportunity to demonstrate its right to escheat the unclaimed distributions from New York debtor brokers. The Special Master concluded instead that all of the property in question must escheat under the *Texas* backup provision, since no debtor entity has any identifying information concerning ultimate beneficial owners.

It is apparent from the Special Master's Report that its conclusions were propelled by the notion that it would be fairer to distribute the funds which New York presently escheats to more jurisdictions. This is accomplished in part by diverting all of the property to the States under the *Texas* backup rule as parsed by the Special Master, pursuant to which the issuer is viewed as the debtor. Since many issuers are domiciled in Delaware, however, the Special Master also found it necessary to change the locational test under the backup rule from that of the issuer's domicile to its chief executive office.

Even if this case is to be decided on fairness grounds, a more even division of the property is not necessarily more fair. Securities depositories, brokers and banks perform essential and highly complex functions without which there could be no corporate and governmental investment. Since New York gives the benefits of its economy and laws to DTC, New York brokers and New York banks, the abandoned property held by these entities appropriately escheats to New York.

II. THE *TEXAS V. NEW JERSEY* RULE

A. The Court's Concerns For Fairness And Ease Of Administration Are Embodied In The Creditor's Last Known Address Provision Of The *Texas* Primary Rule

In *Texas v. New Jersey*, 379 U.S. 674 (1965), the Court was asked to settle a controversy among States as to which State had

jurisdiction to escheat certain abandoned intangible personal property.[9] The property in question, debts of Sun Oil Company, a New Jersey corporation, resulted primarily from the failure of creditors to claim or cash checks in payment of Sun's various debt obligations. The amounts were owed to creditors some of whom had last known addresses on the books of Sun's two Texas offices or other offices throughout the country, and some of whom had no last known addresses indicated.

In the case of unclaimed cash dividends on Sun's common stock, the funds for payment were deposited in a special dividend account in a Philadelphia bank on which checks were drawn. *See* Report of the Special Master, *Texas v. New Jersey*, No. 13 Original, at 11 (Dec. 2, 1963). After two years, funds to cover unclaimed dividends were transferred from the special dividend account to a general account of the company in Philadelphia. *Id.* In the case of unclaimed stock scrip certificates for fractional shares of Sun resulting from stock dividends, the certificates were issued by Sun's transfer agent, Chase Manhattan Bank of New York, and were held in Philadelphia after being returned to Sun undelivered. *Id.* at 12, 13. It is thus apparent from the record in *Texas v. New Jersey* that Sun's unclaimed stock distributions were held either by Sun or its agents, not by a stockholder of record.[10]

Texas claimed the right to escheat all of the property as the State with the most significant "contacts" with the debt. New Jersey asserted that it had the power to escheat as the domicile

---

[9] The Court noted that "[a]s was pointed out in *Western Union Tel. Co. v. Pennsylvania*, 368 U.S. 71, 77-78, none of this Court's cases allowing States to escheat intangible property decided the possible effect of conflicting claims of other States." *Texas v. New Jersey*, 379 U.S. at 682, n.13.

[10] Sun also employed the Fidelity - Philadelphia Trust Company as co-transfer agent for the transfer of the shares of the company's stock, and the Bankers Trust Company of New York and the Girard Trust Corn Exchange Bank of Philadelphia as registrars. Report of the Special Master, *Texas v. New Jersey*, No. 13 Original, at 5 (Dec. 2, 1963).

of the debtor, Sun. Pennsylvania's claim looked to the fact that Sun's principal office and corporate activities were there. Finally, Florida laid claim only to those items that were payable to persons whose last known address was in Florida.

The Court rejected the "contacts" solution proposed by Texas because it concluded that the problem before it, deciding which State's claim to escheat is superior to all others, should not be controlled by a test to determine "whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts, a jurisdiction which need not be exclusive." *Texas v. New Jersey*, 379 U.S. at 678. The Court also concluded that the "contacts" test was unworkable in this situation because it would require the Court to "examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State's claim . . . seems stronger than another's." *Id.* at 679.

Turning to New Jersey's bid as Sun's State of incorporation, the Court found that this approach had the "obvious virtues of clarity and ease of application," but declined, on principles of fairness, to confer the primary right of escheat upon the State in which the debtor happened to be incorporated. *Texas v. New Jersey*, 379 U.S. at 680. In this respect, the Court found it more persuasive to look to Pennsylvania, the State in which Sun's principal offices were located, because Sun benefitted more from that State's economy and laws. However, the Court did not adopt Pennsylvania's proposal because "these debts owed by Sun are not property to it, but rather a liability, and it would be strange to convert a liability into an asset when the State decides to escheat." *Id.* The Court also doubted the functionality of Pennsylvania's approach because it "would raise in every case the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located." *Id.*

The Court adopted the rule advanced by Florida, "that since a debt is property of the creditor, not of the debtor, fairness among the States requires that the right and power to escheat

the debt should be accorded to the State of the creditor's last known address as shown on the debtor's books and records." *Texas v. New Jersey*, 379 U.S. at 680-681. The Court noted that this rule was a variation of the common law maxim "*mobilia sequuntur personam*," establishing the situs of personal property at the domicile of its owner.[11] *Id.* at 680, n.10. It found the rule to be consistent with a group of cases dealing with intangible property for other purposes in other areas of the law.[12] The Court further stated that the rule "takes account of the fact that if the creditor instead of perhaps leaving behind an uncashed check had negotiated the check and left behind the cash, this State would have been the sole possible escheat claimant." 379 U.S. at 681. Finally, the Court indicated that the rule "will tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.*

After considering the rule's fairness, the Court assessed its practicality, concluding that it satisfied the concern for ease of administration. *Texas v. New Jersey*, 379 U.S. at 681-682. In this context, the Court said that by looking to the creditor's domicile, and using a standard of last known address on the records of the debtor rather than technical legal concepts of residence and domicile, the rule "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided." *Id.* at 681. The Court noted its agreement with the Special Master that "the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last known address." *Texas v. New Jersey*, 379 U.S. at 681, n.11. This, the Court said, was consistent with the fact that its inquiry was not concerned with the technical domicile of the creditor, whereas ease of administration was an important consideration.

---

[11] As set forth in the Report of the Special Master in *Texas v. New Jersey*, escheat is a proceeding in rem in which a State seeks to acquire title to and take possession of abandoned property. *Id.* at 21. The exercise of such jurisdiction is valid only if the situs or location of the property or res involved is within the territorial boundaries of the State. *Id.*

[12] The Court cited, as examples, *Baldwin v. Missouri*, 281 U.S. 586 (1930), *Farmers Loan & Trust Co. v. Minnesota*, 280 U.S. 204 (1930), and *Blodgett v. Silberman*, 277 U.S. 1 (1928). 379 U.S. at 681, n.12.

B. The Court Looked To The Debtor's Domicile For A Rule Of Certainty When The Creditor's Last Known Address Provision Could Not Be Applied

After announcing the creditor's last known address rule, the Court turned to the questions of what was to be done with property owed persons (1) as to whom there is no record of any address at all, or (2) whose last known address is in a State which does not provide for escheat of the property owed them. *Texas v. New Jersey*, 379 U.S. at 682. In both instances, the Court held that the property be subject to escheat by the State of corporate domicile, provided that another State could later escheat upon proof of a superior claim under the primary rule (either by demonstrating that the creditor's last known address is within its borders, or by changing its law to obtain coverage for the property). *Id.* Although the Court referred to the State of "corporate domicile," it is clear from the Master's Report, upon which the Court expressly relied, that the Court was concerned only with the domicile of the debtor. *See* Report of the Special Master, *Texas v. New Jersey*, at 34-35.[13] The Court viewed its backup provision as addressing problems that were "likely to arise with comparative infrequency," and which was "conducive to needed certainty." *Texas v. New Jersey*, 379 U.S. at 682.

C. The Court Refused To Carve Out An Exception To The *Texas v. New Jersey* Rule Based Upon The Facts Of A Particular Case

In *Pennsylvania v. New York*, 407 U.S. 206 (1972), the Court had the opportunity to apply the *Texas v. New Jersey* rule to

---

[13] It is further apparent from the Report that in selecting the domicile of the debtor in the absence of a known creditor, the Special Master was concerned with the debtor in the sense of the entity obligated to pay the funds. Thus, the Special Master cited authorities such as *Standard Oil Company v. New Jersey*, 341 U.S. 428 (1951), wherein "the court speaks of the power of the state to seize the debt by jurisdiction over the debtor and since it is the obligation to pay that is seized, the jurisdiction of the debtor corporation effects a seizure." Report of the Special Master, *Texas v. New Jersey*, at 35.

another dispute among States over the right to escheat certain abandoned intangible property, this time the unclaimed funds paid to the Western Union Telegraph Company for the purchase of money orders. The Court described Western Union's telegraph money order business by reference to the description in its earlier decision in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961), as follows:

> A sender goes to a Western Union office, fills out an application and gives it to the company clerk who waits on him together with the money to be sent and the charges for sending it. A receipt is given to the sender and a telegraph message is transmitted to the company's office nearest to the payee directing that office to pay the money order to the payee. The payee is then notified and upon properly identifying himself is given a negotiable draft, which he can either endorse and cash at once or keep for use in the future. If the payee cannot be located for delivery of the notice, or fails to call for the draft within 72 hours, the office of destination notifies the sending office. This office then notifies the original sender of the failure to deliver and makes a refund, as it makes payments to payees, by way of a negotiable draft which may be either cashed immediately or kept for use in the future.
>
> In the thousands of money order transactions carried on by the company, it sometimes happens that it can neither make payment to the payee nor make a refund to the sender. Similarly, payees and senders who accept drafts as payment or refund sometimes fail to cash them. For this reason, large amounts of money due from Western Union for undelivered money orders and unpaid drafts accumulate over the years in the company's offices and bank accounts throughout the country.

Id. at 72-73.

Pennsylvania instituted the action against New York, Florida, Oregon, Virginia and Western Union.[14] The States of California, Indiana and Arizona were permitted to intervene, and New Jersey filed an *amicus* brief. In fact, most jurisdictions had an interest in the outcome since Western Union did business and had offices in all States except Alaska and Hawaii, as well as in the District of Columbia. *See Pennsylvania v. New York*, 407 U.S. at 208 (citing *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961)).

Pennsylvania asserted the right to escheat the unclaimed proceeds of money orders purchased from Western Union offices in that State. In support of its place of purchase theory, Pennsylvania contended that because Western Union's money order records did not identify anyone as a "creditor," and in many instances did not list an address for either the sender or payee, strict application of the *Texas v. New Jersey* rule would result in the escheat of almost all the funds to New York, Western Union's domicile.[15] Pennsylvania argued that selecting the State of purchase "as determinative would result in a division of the funds roughly in proportion to the amount of business originating in each State." Report of the Special Master, *Pennsylvania v. New York*, No. 40 Original, at 14 (Jan. 11, 1972). Pennsylvania urged finally that its solution could be harmonized

---

[14] Pennsylvania's prior effort to take custody of the funds through proceedings in its courts was overturned by this Court in *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71 (1961). The Court held, based upon its exclusive jurisdiction over the disputes between States, that it was the only forum that could give Western Union due process of law by protecting it against the rival claims of other States.

[15] The Special Master found that Western Union maintained ledger books which showed the amount of the transaction and the location of the office of origin and the office of destination, but did not designate a creditor, or indicate the address of either the sender or the payee. Report of the Special Master, *Pennsylvania v. New York*, No. 40 Original, at 8-9 (Jan. 11, 1972). The Special Master also found, however, that the senders' application forms, including their addresses whenever supplied, were retained in records that went back as far as 1930. *Id.* at 9.

with *Texas v. New Jersey* by treating the State of purchase as presumptively the sender's (creditor's) residence. *Pennsylvania v. New York*, 407 U.S. at 211-212. Florida and Arizona supported Pennsylvania but argued in favor of the State of destination as having the primary right to escheat the property. *Id.* at 212. These States later abandoned this approach for that of the State of purchase. *Id.* at 214.

The Court adopted the Report of the Special Master recommending that the *Texas* rule be strictly applied to all items in the case. *Pennsylvania v. New York*, 407 U.S. at 212-213. The Court specifically referred to the Special Master's finding that the *Texas* rule should apply to these obligations, as they were applied to the obligations in *Texas v. New Jersey*, because the *Texas* rule " 'presents an easily administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely.' " *Id.* at 213 (citing Report at 20). The Court also quoted language from the Report which clearly viewed Western Union's obligation to be that of a common debt owed to a creditor, be that the sender or the payee.

> 'Any sum now held by Western Union unclaimed for the period of time prescribed by the applicable State statutes may be escheated or taken into custody by the State in which the records of Western Union placed the address of the creditor, whether that creditor be the payee of an unpaid draft, the sender of a money order entitled to a refund, or an individual whose claim has been underpaid through error . . . . [I]f no address is contained in the records of Western Union, or if the State in which the address of the creditor falls has no applicable escheat law, then the right to escheat or take custody shall be in the domicilary State of the debtor, in this case, New York.'

407 U.S. at 213 (quoting Report, at 20-21).[16]

---

[16] The Report also stated: "In this case the nature of Western Union's obligation appears to the Special Master to be that of a common debt, not dissimilar

(Footnote continued)

In reaching its result, the Court stated that "we do not regard the likelihood of a 'windfall' for New York as a sufficient reason for carving out this exception to the *Texas* rule." *Pennsylvania v. New York*, 407 U.S. at 214. It noted that "*Texas v. New Jersey* was not grounded on the assumption that all creditors' addresses are known" and, therefore, "the only arguable basis for distinguishing money orders is that they involve a higher percentage of unknown addresses." *Id.* However, "we are not told what percentage is high enough to justify an exception to the *Texas* rule, nor is it clear that money orders constitute the only form of transaction where the percentage of unknown addresses may run high." *Id.* at 214-15.[17] Thus, the Court concluded:

> In other words, to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided - that is, 'to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever - developing new categories of facts.' *Texas v. New Jersey*, 379 U.S. at 679.

Pennsylvania v. New York, 407 U.S. at 215. To the extent that creditor addresses were available from the individual money order applications, as opposed to Western Union's ledger books, the Court placed the burden of establishing the addresses on the claimant State. *Id.*

The dissenters supported a modification of the *Texas* rule. *Pennsylvania v. New York*, 407 U.S. at 216-222 (opinion of

---

to the types of obligations considered by this court in *Texas v. New Jersey*." Report of the Special Master, *Pennsylvania v. New York*, at 15 (footnote omitted).

[17] For example, the American Express Company, in its *amicus* brief, informed the Court that it retained the addresses of its travelers check purchasers, if given, for only a short period of time. American Express held $2,224,200 in unclaimed proceeds of travelers checks dating back to 1964. *See* Pennsylvania's Petition for Rehearing, *Pennsylvania v. New York*, at 3.

Powell, J., in which Blackmun and Rehnquist, JJ., joined). They proposed that the State of purchase be presumed to be the State of the creditor's domicile when the payee failed to claim the money, and the State of destination carry that presumption whenever a draft had been issued to either the payee or the sender but it was not negotiated. *Id.* at 220.

III. THE EVIDENTIARY RECORD

Following New York's motion for judgment on the pleadings, the Special Master authorized a limited program of discovery. Report at 6.

> Discovery was permitted to seek identification of the principal entities involved in the securities distribution process, the levels, steps, or stages in the process, the relationships *inter se* of the organizations involved, and the variety of circumstances giving rise to the unclaimed intangible distributions in which the parties assert an interest.

The Special Master attempted to compile the results of this discovery into Appendix B to his Report, titled "Facts Not Reasonably Subject To Dispute" (B-1 to B-22), and "Metafacts: General Propositions Generally Beyond Dispute" (B-22 to B-25). New York, however, has disputed, and continues to dispute, many of the Special Master's characterizations of the evidentiary record set forth in Appendix B. *See, e.g.*, Comments On The Draft Report Of The Special Master By Defendant State of New York (August 12, 1991). The errors contained in Appendix B are set forth in the discussion below of the discovery's salient themes, as well as in the detailed analysis of the record holders' operations that follows.

The abandoned property in this case arises when the issuer or its paying agent overpays a distribution to a registered owner, here DTC, New York custodian banks and New York debtor brokers. The principal reason for the overpayment is that the registered owner no longer owns the underlying security when the distribution is paid. The new owner, being unable to

re-register the security into its own name in time to receive the distribution, is underpaid.[18]

The registered owner owes the distribution to the new owner. The issuer, having discharged its debt by paying the registered owner, has a complete defense to a claim from the new owner. U.C.C. § 8-207(1).[19] The issuer, moreover, does not (and apparently cannot) claim the property back from the registered owner.[20]

There is no dispute among the parties that the books and records of record holders such as DTC and custodian banks do not identify the creditors of their unclaimed distributions. The evidentiary record is instructive in this regard because it explains why these entities are unable to record a last known address for

---

[18] Issuers and their agents close their books for a particular distribution on a specified date, called the "record date." The distribution is paid to the registered owner as of that date.

[19] If the issuer (or its paying agent) is unable to effect payment on the registered owner, the issuer remains the debtor. Applying the *Texas v. New Jersey* rules in that situation, the primary right of escheat lies with the State of last known address of the registered owner on the issuer's books. If the address is in a jurisdiction that does not have coverage for this property (or there is no registered owner, as in the case of bearer certificates), the issuer's domicile escheats the property. This is in accord with the escheat practices followed by the Corporate Trust Department of Citibank, N.A., a paying agent. *See* Deposition Transcript of Katherine Wellener, a Vice President of the Corporate Trust Department, at 57-60, 67, 68, 130-131, 143-145, 147, 148. Although the escheat of unclaimed funds in the hands of issuers and their paying agents is not involved in this litigation, the Special Master was under the erroneous belief that such property is retained by the issuer, or escheats only to its domicile rather than to the State of last known address of the registered owner in the first instance. *See* Report, Appendix B, Facts (23), (24), at B-6.

[20] The Special Master recognized that issuers do not reclaim distributions paid to registered owners, adding that even if they were legally entitled to do so, there would be no financial incentive to make the effort because the property would eventually escheat to their home State. Report at 36, n.33. This statement unaccountably ignores the substantial financial incentives to be derived from the interest on the property that accrues in the years preceding escheat. This benefit is enjoyed by the registered owners.

the new owner of the security. In the case of DTC this is due to a phenomenon called Cede float, certificates registered in DTC's nominee name, Cede & Co., and placed in the stream of commerce. DTC cannot track the movements of its Cede certificates. In the case of custodian banks, which deliver out physical certificates registered in their nominee name to settle trades in the underlying securities ("nominee float"), the banks' records do not identify the new owners because the banks are not participants to the trades. New York escheats the property from DTC and New York custodian banks under the *Texas* backup rule as the domicile of these debtor entities.[21]

By contrast, when brokers deliver out physical certificates registered in their nominee name to settle trades for their customers, the certificates are sent directly to the purchasing broker or bank. The address on the delivery ticket, which the selling broker retains, is the last known address of the new owner of the security. In the case of the brokers' nominee float, therefore, the brokers' records do identify the new owners of the securities. Based upon sample audits of the records of New York debtor brokers, New York has determined that in almost all instances, New York debtor brokers deliver their physical certificates to creditor brokers and banks addressed in New York. *See* Affidavit of Robert Griffin, Director of Audits, Office of Unclaimed Funds (May 5, 1988), annexed to New York's Brief in Opposition To Delaware's Motion For Leave To File Complaint. Accordingly, New York claims this property under the *Texas* primary rule.

The Special Master's central misconception concerning the evidentiary record is his belief that unclaimed distributions arise for various reasons, including errors on the part of the record holders. *See* Appendix B. In fact, errors, missed transfers and other discrepancies cause initial overpayments to the record

---

[21] The custodian banks involved here, in addition to banks chartered in New York, include national banks whose principal operations are conducted in New York. The Special Master recognized the appropriateness of using principal place of business to locate federally chartered entities. Report at 49, n.45.

holders, but not abandoned property. Their automated accounting procedures and other control mechanisms detect these differences and correct them long before they become a meaningful source of escheatable funds. The principal cause of abandoned securities distributions is the continued presence of securities issues in certificated format, giving rise to Cede float and nominee float. Thus, the witness for DTC testified that:

> "A. As long as there are certificates outstanding, we will have differences with agents. What it will eliminate, once all the outstanding Cede Float certificates are transferred, it will eliminate to a large extent overpayments.
>
> Q. Because most of the overpayments result from Cede Float?
>
> A. We know for a fact, we know just by looking at the overpayment balance drops as a result of claims that come into us."

DeCesare Dep. at 353.

In addition, record holders such as DTC and brokers are taking steps to ameliorate the problems created by certificated issues as well as promote the changeover to certificateless issues, which will eliminate the problem of abandoned property in this area.

> "Q. Just so the record may be clear when you say T plus three, are you referring to the proposed procedure to have all trades settle three days after the trade date?
>
> A. As opposed to five days after.
>
> Q. Which is the current practice?
>
> A. That's correct. Current practice. One of the things that's built into that is that all settlements between financial institutions, including banks, brokers and DVP clients, will be only done through the depository

> situation, and so virtually every security would have to become depository eligible.
>
> A second recommendation is that the certificate ultimately be eliminated and they're trying to focus on a time frame for that so that, as we go forward, only having securities in the depository environment will dramatically if not effectively eliminate over-payments that result from dividend and interest."

Cirrito Dep. (Prudential-Bache Securities, Inc.) at 152-153.

The Special Master's failure to correctly interpret the evidence resulted in various errors in his legal analysis. He concluded, for example, that New York's claim under the *Texas* primary rule could not depend upon the last known addresses of creditor brokers and banks because these entities do not have ownership interests in the property unless they were trading for their own accounts. Report at 63-65. Although the primary rule looks only to the apparent owner on the debtor's records, the creditor brokers and banks do have beneficial ownership interests in the property in question as well. These entities testified that they routinely pay their customers (beneficial owners) all of the income distributions to which they are entitled. Shearer Dep. at 124, 135, 138, 140, 152, 154-155, 171, 190-191; Principe Dep. at 79-80; Cirrito Dep. at 61-62, 125-126; Scott Dep. at 53 (*see* p. 26, n.27, and p. 29, n.30). Accordingly, if the creditor broker or bank is underpaid, the distribution belongs to it. This is further exemplified by the fact that for the years 1985 through 1989, 97.4% of the claims which New York has paid, or is in the process of paying, are to brokers and financial institutions including banks and DTC. *See* Responses of the State of New York to the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, Answers to Interrogatories 5(e) and 25. The Special Master did not appreciate the significance of the automatic payment procedures in giving beneficial ownership interests in the property in question to creditor brokers and banks because he attributed the abandoned property to the *debtor brokers'* inability to pay distributions to their own customers due to bookkeeping and other errors. *See* Report at 62, n.54. The Master cited no evidentiary support for his conclusion.

By attributing abandoned property to record holder error the Special Master also failed to appreciate the merit of permitting escheat by the jurisdictions most closely associated with the record holders. *See* Report at 35-36. Indeed, understanding that the principal cause of abandoned securities distributions is the persistence of securities issues in certificated format focuses responsibility on the issuers, not the record holders. If, as the Special Master believed, a fairness test should be applied in determining which jurisdictions should escheat the property in question, then the role of the record holders in seeking to eliminate the certificated security should have been given dominant consideration.

A. The Depository Trust Company[22]

DTC, a limited purpose trust company incorporated under New York's Banking Law, is the largest of three securities depositories in the United States (the others are The Mid-West Securities Depository Trust Company and The Philadelphia Depository Trust Company). DTC is owned by its "participant" brokers and banks whose ownership interests in the company are revised annually according to a formula that reflects their use of the depository during the preceding year.

The basic concept underlying the securities depository is the funneling of its participants' securities holdings into a centralized location. In the case of certificated issues, brokers and custodian banks can then conduct their transactions without physical movement of the certificates. Income distributions can also be paid to the depository for distribution to its participants. Indeed, DTC was born out of the paperwork crisis in the securities industry in the late 1960's, when the increase in the volume of trades, coupled with the settlement of trades by manual deliveries of certificates against payment, created processing difficulties that became unmanageable.

---

[22] The operations of The Depository Trust Company were presented in a Statement prepared in conjunction with the discovery requests of the plaintiff-intervenor States, the deposition testimony of Raymond DeCesare, a company officer, and supplemental documents.

When a participant deposits eligible certificated securities (those satisfying DTC's operational requirements) into DTC's custody, DTC makes a "book entry" into the participant's account to reflect the participant's ownership of the security. DTC makes subsequent changes to the participant's ownership position in that security by electronically recording book entry credits and debits. Thus, if a participant sells a security to another participant, DTC debits the account of the selling broker or bank and makes a corresponding book entry credit into the account of the purchasing broker or bank. The certificates themselves remain "parked" in DTC's vault.

Because of DTC's extensive securities holdings, large number of participants, and interface with the country's two other securities depositories, most securities trades today are handled by book entry. This has gone a long way in eliminating nominee float at the brokerage level and the resultant unclaimed property. The potential for nominee float persists, however, in the case of securities that are not depository eligible, or when one or both of the trading entities are not depository participants.

The physical certificates which DTC holds are registered in its nominee name, "Cede & Co." When DTC initially receives custody of certificates, it immediately forwards them to the issuer's transfer agent for re-registration into Cede certificates. Thereafter, the issuer or its paying agent will pay income and dividend distributions directly to DTC, based upon the securities' Cede registration. DTC pays the distributions to its participants according to their book entry ownership position in the security on the record date.[23]

After DTC credits its participants' accounts on the payable date, by applying the payment rate to their record date ownership positions, DTC may receive more or less than it expected

---

[23] DTC requires paying agents of corporate equity and debt securities to pay distributions in immediately available funds. DeCesare Dep. at 184-188. Since DTC pays its participants in next-day funds, DTC, not the paying agents, realizes a profit on the float. DTC uses the profit to offset costs and pays any surplus to its participants. DeCesare Dep. at 177.

from the issuer or its paying agent. DTC initially investigates the difference and resolves out-of-balance conditions with issuers and paying agents. DTC also checks its participant account records for erroneous entries. At the close of each business day, for example, DTC's computerized systems produce a trial balance which will detect overages and underages. DeCesare Dep. at 116.[24] DTC also generates a daily settlement report for each participant, including the distributions disbursed to the participant that day. *Id.* at 66. Participants are required to confirm on a daily and monthly basis that they agree with their positions as reported by DTC. *Id.* at 139, 310-311, 388-389. DTC does not believe that initial overpayments due to out-of-balance conditions or errors are a significant source of its unclaimed property. DTC Statement at 15-18.

DTC pinpoints the cause of its abandoned property as "Cede float."[25] DTC Statement at 15-18. Cede float is caused by DTC's Certificate On Demand ("COD") withdrawal procedure.[26]

---

[24] DTC also considers it unlikely that a paying agent will permit an overpayment to DTC to go undetected since the agent will then have a corresponding underpayment to another registered owner. DeCesare Dep. at 120-122.

[25] By contrast, the Report of the Special Master ignored DTC's conclusion that its abandoned property is caused by Cede float. Instead, the Special Master treated all initial overages at DTC as causes of abandoned property. *See* Report at Appendix B, Facts (41) to (45), at B-12 to B-13. While errors (41), out-of-balance conditions (42), and rate changes (45) give rise to such initial overages, they are corrected long before the property is deemed abandoned. Fact (43) discussing "occasional mishandling of bearer bonds," is irrelevant since such "found" bonds are rare and do not escheat as intangible property. *See* DTC Statement at 16 n. Only Facts (38), (39) and (44) relating to Cede float are pertinent.

[26] DTC notes that another withdrawal procedure, called "Withdrawal By Transfer," could give rise to abandoned property. DTC Statement at 12, n.1. Participants use this procedure when they want certificates to be re-registered prior to withdrawal. DTC forwards the participant's transfer instructions to the transfer agent. If the agent subscribes to DTC's Fast Automated Securities Transfer ("FAST") program, the agent will issue the newly registered certificates. Otherwise, DTC must forward the Cede certificates for re-registration to the agent along with the instructions. Since DTC does not retain the instructions, its records will not indicate the new registered owner in the event that the transfer misses the record date and DTC is paid the distribution.

(Footnote continued)

Participants use COD withdrawals when they have an urgent need for physical certificates and cannot arrange for their re-registration prior to withdrawal. This could occur, for example, if the participant requires the certificates to settle a trade outside of the depository. When the certificates are withdrawn from DTC's vault and given to the participant, they enter the stream of commerce still registered in Cede's name. DTC Statement at 17. DTC has no control over these Cede certificates and no way of knowing who owns them on a record date. *Id.*

DTC does not consider the participant who made the COD withdrawal to be entitled to a distribution paid to DTC on Cede float.

> While DTC knows who withdrew Cede float, the withdrawing participant is unlikely still to be the owner of Cede float not promptly re-registered. It is presumed the Participant withdrew the COD to make physical delivery to a party unknown to DTC. Thus, the withdrawing participant's address is not considered to be the "last known address of the creditor" for the unclaimed distribution.

DTC Statement at 17. DTC accepts claims for distributions from participants and non-participants, and from individuals represented by a financial institution who present the underlying Cede certificates. DTC's claim verification procedures are described in its Statement, at 18. Most claims are made between three to six months after a record date. DeCesare Dep. at 242, 272-273. DTC reports the property that is unclaimed after three years to New York, its State of incorporation, since the owners of its Cede float are unknown. DTC Statement at 19. After escheat, DTC will provide a claimant with the necessary documentation to recover the funds from New York.

However, the fact that the certificates are re-registered means that the new registered owner is likely to claim the distribution from DTC long before the property is deemed abandoned. That is not so in the case of Cede float, because Cede certificates continue to change hands. *Compare* Report of the Special Master, Appendix B, Facts (36), (37), (38), at B-10 to B-11, which does not emphasize, as DTC does, the predominance of Cede float in DTC's unclaimed property holdings.

In an effort to eliminate Cede float, DTC has devised a new withdrawal procedure called Rush Withdrawals By Transfer. DTC Statement at 6. The procedure allows for withdrawal and re-registration of Cede certificates within 48 hours. DTC is also advancing certificateless or "Book Entry Only" securities. DTC Statement at 8. Under this form of issuance, a single certificate evidencing all securities outstanding for the issue is registered in the name of Cede & Co. and held in DTC's vault. The certificate may be cancelled and reissued to reflect denomination changes if additional securities are issued or a portion of the issue is redeemed. Because certificates are not available, no withdrawals can occur. As of March 1990, after three years of experience with Book Entry Only securities, DTC has not had a single unresolved overpayment on such issues. DTC Statement at 15.

B. Custodian Banks[27]

The custodial services division of a bank acts as the custodian for customers' investment portfolios. As custodian, the bank does not trade for its customers. Rather, it maintains a computer record of the holdings in each customer's account, which it updates as transactions occur and uses to distribute dividend and interest payments.[28]

When the bank receives a customer's certificated holdings, they may be registered in street name, the customer's name, or

---

[27] The operation of custodian banks was exemplified by the Custody Services Division of Citibank, N.A., through its Narrative Statement, the deposition testimony of Hugh Scott, the operation head of the Custody Services Division's corporate reorganization and income collection units, and various documents.

[28] The bank also distributes materials to its customers from issuers regarding the securities it holds as custodian, including exchanges, tenders, conversions, annual reports, proxy materials and voting solicitations. Unless the bank has express authorization from a customer, it will not disclose any information about a customer to an issuer or its agent. The bank only informs the issuer's agent, upon request, of the number of sets of materials that are needed for distribution. Scott Dep. at 120-121, 123-127, 198.

the name of another holder. If the security is depository eligible, the bank arranges for the re-registration of the certificates into the depository's nominee name, such as DTC's nominee, Cede & Co. Otherwise, the bank re-registers the certificate into its nominee name.

The announcement of an upcoming dividend or interest distribution is posted in the bank's computerized files either manually or by a direct computer "feed" from a subscription data service. The bank then generates a pending file of all customer accounts and their positions in the particular security on the record date. These accounts are marked with a "pay" instruction and are automatically credited with the distribution on the pay date. The bank pays its customers on the pay date regardless of whether it has received payment of the distribution. Scott Dep. at 53; *see also* Citibank Narr. St. at 1 of 4. The payment is not reversible unless the bank subsequently determines that the customer was not entitled to it in the first place.

The bank receives distributions from DTC if its holdings are on deposit there, and directly from issuers or their paying agents on securities registered in the bank's nominee name. Based on the evidence provided by Citibank, neither out-of-balance conditions between it and DTC or issuers and their paying agents, nor internal errors in the records of its customer holdings, is responsible for unclaimed property. Scott Dep. at 166-167, 174-175, 215-216. *Compare* Report of the Special Master, Appendix B, Facts (73), (75), (76) at B-20, B-21, which misstate the causes of abandoned property.[29] Citibank relies on its

---

[29] Indeed, at Fact (75), the Special Master described a typical "missed transfer," which could not give rise to abandoned property. He postulated that a broker or bank will have an overpayment if it deposits certificates in its nominee name with a depository, and the depository's effort to re-register it before the record date misses. The Master concluded that the broker or bank would then have an overpayment because it would be paid by both the depository and the issuer's paying agent. In fact, the depository would not pay because its records would show the certificates to be "in transfer." Even if it did pay, it would be able to quickly locate and correct the error long before the property was deemed abandoned.

computer technology to identify out-of-balance conditions and initiate inquiries. It also relies on its customers, large institutional investors, to initiate inquiries that will reveal initial payment errors.

The abandoned property at custodian banks is the result of nominee float - physical certificates in the bank's nominee name owned by another entity over a record date. Scott Dep. at 163-164, 209; *see also* Report of the Special Master, Appendix B, Fact (74), at B-21 (describing a situation that conforms to the phenomenon of nominee float but is referred to as a "missed transfer"). Nominee float in the context of custodian banks occurs when the bank's customer or representative directs the bank to deliver out physical certificates to the customer, or to its broker or another broker or bank, to settle a trade. Scott Dep. at 98-99, 100, 114. The certificates are forwarded in negotiable form registered in the bank's nominee name. *Id.* The bank will be paid the distribution on the underlying security if the certificates are not timely re-registered by their new owner.

When Citibank receives a claim, it requires some documentation that re-registration of the certificate was not accomplished prior to the record date. Since Citibank was not a participant to the transaction that created the nominee float, it also requires information on the trade to validate the claim. Scott Dep. at 190. Citibank's records reflect only the deliveries of the certificates, which may or may not have been sent to the purchasing entity. In 1990, Citibank was receiving claims for overpayments booked into its payable accounts in 1986 and 1987. Scott Dep. at 168. It attributed the upsurge in claims to the financial decline in the securities industry. *Id.* As a result, brokers and banks were intensifying their efforts to research outstanding receivables and collect them. *Id.* If no claim is received after three years, Citibank, as a national bank whose principal operations are in New York, reports the unclaimed property to New York under the *Texas* backup rule since its records do not identify the creditors of the abandoned property it holds.

C. Brokerage Firms[30]

When a broker is the registered owner of a security on the record date, the issuer or its paying agent will pay the broker a dividend and/or interest distribution based upon the broker's total ownership position on the issuer's books.[31] If the broker receives more or less than it expected, it will research the discrepancy. Shearer Dep. at 191, 194-197. The broker, if necessary, goes back to the issuer or its paying agent to resolve any out-of-balance conditions. *Id.* These procedures eliminate initial overages as a source of unclaimed property.

It is the responsibility of the broker to pay its customers the portion of the distribution to which each is entitled. The broker's work in this regard begins at the close of business on the record date. The broker simply determines, through a "snapshot" of each customer's account, the number of shares owned by the customer on the record date. Any changes in that information are entered into a "dividend pending file" prior to the payment date.[32] The adjusted file becomes the basis for allocating the distribution to the customers' accounts.

---

[30] The evidence in the record concerning the operations of brokerage firms was provided by three firms, in response to the discovery requests of the plaintiff-intervenor States. *See* Deposition Transcript of Robert Shearer, Group Manager Operations Division, Merrill Lynch, Pierce Fenner & Smith, dated July 19 and 20, 1990; Deposition Transcript of Joseph S. Principe, Director of Internal Control for the John Hancock Clearing Corporation, the operational entity for the brokerage firm of Tucker Anthony, dated July 25, 1990; and the Deposition Transcript of John Cirrito, a Senior Vice President of Prudential-Bache Securities, Inc., dated July 26, 1990.

[31] Brokers' services are extremely varied. The payment of dividend and interest to their customers, the beneficial owners, is but one aspect. Shearer Dep. at 361; Principe Dep. at 67, 174-175, 187-189, 191-192; Cirrito Dep. at 50-53, and Prudential-Bache Exhibit 7, Example H (Proxy Label Report). Issuers do not have access to, or information about, the brokers' customers unless the customers have designated themselves as "non-objecting beneficial owners" ("NOBOs"). *Id.*; *see* Prudential-Bache Exhibit 7, Example K (Tape Edit Record - NOBO List).

[32] If, for example, the broker forwards a security certificate to a transfer agent to change the registered owner prior to the record date but the transfer "misses,"

(Footnote continued)

As in the case of out-of-balance conditions with a paying agent or securities depository, brokers make certain that their customer account data is correct. Shearer Dep. at 196. In addition, the customers regularly receive account statements which detail their transactions and the distributions credited to their accounts. *See, e.g.*, Prudential-Bache Exhibit 7, Example D (Securities Account Statement). If a customer was underpaid, the customer would normally come in and initiate an inquiry. Shearer Dep. at 226-227. In fact, Merrill Lynch has experienced "very few instances" of this nature. *Id.* at 225. Accordingly, if a broker is left with an overpayment after paying all of its customers, the funds are owed elsewhere.[33]

The brokers attribute their overpayments to securities outstanding in their nominee name which are owned by another broker on the record date ("nominee float"). Cirrito Dep. at 128-129. This occurs when securities are bought and sold, and the trade is settled by the manual delivery of physical certificates. When such transactions are conducted close to a record date, the purchasing broker may be unable to re-register the certificates into its own name before the record date. Therefore, the selling broker remains the registered owner and is paid the distributions to which it is no longer entitled.

In the case of nominee float, the brokers' automatic payment of distributions to their customers satisfies the beneficial owners' interests in the distributions. Although the purchasing brokers may not re-register the certificates into their nominee name in time to receive the distributions from the issuer, they do increase their customers' ownership positions to reflect the purchase. The brokers will then pay the distributions to their customers according to their new ownership positions, thereby ensuring that

---

that is, the change is not made until after the record date, the broker uses the dividend pending file to correct its records accordingly.

[33] The brokers also testified that they do not permit their customers to take possession of physical certificates registered in the broker's nominee name. Shearer Dep. at 67, 69, 86-87; Principe Dep. at 61; Cirrito Dep. at 45-47. Since the certificates are re-registered into the customer's name, the customer receives payment of the distribution directly from the issuer in that case.

the beneficial owners are paid everything they are entitled to. The broker, however, will be underpaid the distribution. The broker records the obligation into an account receivable. The beneficial owner's interest in the distribution has been fully satisfied. As set forth in New York's Renewed Motion For Judgment On The Pleadings (October 30, 1990), at 41-42:

> On pay date, the broker credits all of its customers' accounts that have long positions in the particular security, based upon the dividend or interest rate and the number of shares held. Shearer Dep. at 124, 135, 138, 140, 152, 154-155, 171, 190-191; Principe Dep. at 79-80; Cirrito Dep. at 61-62, 125-126. This is standard practice for all account types and all distributions, including stock dividends, on domestic securities. Shearer Dep. at 120-121; Principe Dep. at 83-84; Cirrito Dep. at 62-63. The crediting procedure is automatic, based upon the dividend pending file as adjusted up to the pay date, and occurs *regardless of whether the broker has actually been paid* by the paying agent or other source. Shearer Dep. at 154-155; Cirrito Dep. at 174-175 and Prudential-Bache Exhibit 7, Example I (Cash Distribution Report - Pay Date). The customer is entitled to the money as of the date it is credited to his account (Shearer Dep. at 113, 156), or it is available to be drawn on the next day (Cirrito Dep. at 64-65). As long as the customer was entitled to the credit, it is not reversible even if the broker itself never receives payment of the distribution. Shearer Dep. at 190-191; Cirrito Dep. at 62-63. (Emphasis added; the deposition references in the original use the brokerage name.)

In order for a broker to reverse the payment to its customer, the circumstance would have to be "awfully extreme." Principe Dep. at 80-81. This occurs only when the broker determines that its customer was not entitled to the distribution in the first instance. Shearer Dep. at 164, 165, 170; Principe Dep. at 81; Cirrito Dep. at 63. An example would be payment of the distribution on an invalid certificate.

Whether or not the overpayment to the debtor broker eventuates into abandoned property depends upon the efforts of the creditor broker to claim the property from the debtor broker. The debtor broker itself will not research the overpayment until it receives the claim. According to the practice at Prudential-Bache, which appears to be representative of the industry, "[i]n most cases, in the vast, vast majority of the cases," the debtor broker will wait for a claim to come in. Cirrito Dep. at 73. *Compare with* Report of the Special Master, Appendix B, Fact (61), at B-18, indicating that debtor broker initiative in researching overpayments is not unusual. If the creditor broker decides to write off the receivable or is unsuccessful in pursuing a claim, the property will become escheatable.

When a creditor broker makes a claim, it must specify the security, record date, pay date and precise certificate numbers of the shares it owned on the record date but which were registered in the debtor broker's name.[34] The "inherent uncertainty" in resolving such an ownership interest, recognized by the Special Master (*see* Report, Appendix B, Fact (61), at B-18), militates against the pursuit of all claims. Merrill Lynch focuses on a threshold amount, while Prudential-Bache factors the amount into its decision, which it characterized as being one of "degrees." Shearer Dep. at 239-241; Cirrito Dep. at 77-78. Indeed, the fact that brokers exercise this discretion in pursuing claims contradicts the Special Master's belief that at least in part, the claims are "to recover distributions to which . . . their customers were entitled on a payable date." Report, Appendix B, Fact (60), at B-17. *See also* Fact (65), at B-19.

Claims are generally made within a couple of weeks after the pay date and drop off dramatically after a year. Shearer Dep.

---

[34] The Special Master's description of the claiming process is incorrect. *See* Report, Appendix B, Fact (61), at B-18. According to the description there, the claimant (creditor broker) must show that "the certificate was registered in the name of the claiming brokerage at some time prior to the record date for the payment of the distribution." *Id.* Were this so, the claiming brokerage, as the record owner prior to the record date, would have received the distribution.

at 231-232.[35] The residue of the property, arising out of nominee float, becomes the corpus of property that is ultimately deemed abandoned and escheatable.[36]

Since debtor brokers make no effort to research overpayments, if no claim is made, the debtor broker is unaware of the creditor broker's identity at the time of the escheat. However, as the Special Master recognized, there are "numerous verification procedures" available to the debtor broker which, if undertaken, would establish the creditor broker's identity.

> It may have recourse to its "overs" or "overage" account to determine whether it booked an overpayment in the particular security for the record and pay dates involved. The broker may also examine its daily stock record which lists, by account number, all trades in that security on a particular day. This record may indicate whether a delivery was made to the claiming broker around the record date. In addition, the firm may inspect records to match the certificate numbers in the claim against those on its delivery tickets.

Report, Appendix B, Fact (62), at B-18.

---

[35] In addition to claims arising out of nominee float, brokers claim against other brokers for distributions owed to them on a "fail to deliver" (or "fail to receive"), and on securities loaned or pledged. *See* Report of the Special Master, Appendix B, Facts (58), (59), at B-17. The critical distinction between these claims and those arising out of nominee float, unacknowledged by the Special Master, is that brokers' transactional records, both those of the creditor broker and the debtor broker, flag "fails," loans and pledges. Shearer Dep. at 294; Principe Dep. at 78, 100-101, 168; Cirrito Dep. at 75-76, 87. Thus, the creditor brokers routinely make, and prevail on, such claims. Even in these situations, however, the debtor brokers wait for claims to come in.

[36] In view of the enormous number of accounts, securities and trades handled by the large brokerage houses, the residue of unclaimed distributions is, indeed, comparatively minute. Merrill Lynch and Prudential-Bache have millions of accounts worldwide. Shearer Dep. at 29; Cirrito Dep. at 18. Prudential-Bache estimated that it has 300,000 different securities on its books, and conducts between 30,000 and 40,000 trades a day. Cirrito Dep. at 18, 167. Merrill Lynch estimated that "far, far less" than 1% of the distributions it receives in a year are unaccounted for. Shearer Dep. at 516.

The delivery ticket in particular, which documents the actual delivery of the physical certificates, identifies the contraparty to the trade and, hence, the creditor broker of the unclaimed distribution. New York escheats the unclaimed property of debtor brokers in New York as the State of last known address of almost all of the creditor brokers and banks on the debtor brokers' books and records.

IV. THE REPORT OF THE SPECIAL MASTER

A. Overview

The States raised three disparate legal theories in asserting their right to escheat the unclaimed distributions reported to New York by New York debtor brokers, DTC and New York custodian banks. In its complaint filed on May 31, 1988 pursuant to leave of the Court (486 U.S. 1030), Delaware asserted a claim to the distributions held by brokers incorporated in Delaware for which there was no known beneficial owner on the brokers' books and records. Delaware advanced its claim under the *Texas v. New Jersey* backup rule as the debtors' domiciliary State.

Texas, as an intervening plaintiff, asserted a claim to a portion of the same property claimed by Delaware. The Texas complaint was accepted for filing on February 21, 1989 (489 U.S. 1005). The complaint alleged that Texas was entitled to escheat the distributions owed to unknown beneficial owners if the underlying securities were issued by corporations and municipalities domiciled in Texas. The Texas theory was predicated on the *Texas v. New Jersey* backup rule, except that Texas asserted that the securities issuers, not the brokers, were the debtors of the property. In October, 1989, Texas amended its complaint to encompass the unclaimed distributions on Texas securities issues paid to DTC and New York's custodian banks. Various States supporting the Texas theory, including the lead State of Alabama, filed motions to intervene on April 21, 1989.

Finally, on November 17, 1989, the State of California, with other States jointly moving for leave to intervene, asserted a claim

to a portion of the property in question to the extent it was generated by the commercial activities of unknown beneficial owners in each State. The California theory was advocated as a variant of the *Texas v. New Jersey* primary rule in that these States alleged that the resulting allocation of the property, pursuant to some aggregate formula, would satisfy that rule's concern for fairness and further goal of tending to distribute the funds to the States in proportion to the commercial activities of their residents. The California theory was also adopted by the District of Columbia in a separate motion for leave to intervene.[37]

New York defended its claim to the property in its answers to the complaints,[38] opposing brief,[39] and dispositive motions against the intervenors.[40] New York asserted that it was entitled to the property in accordance with *Texas v. New Jersey* and *Pennsylvania v. New York*, and that the intervenors' theories could not succeed without changing those precedents. New York

---

[37] The Special Master has recommended that the Court grant the applications of all jurisdictions that filed motions for leave to intervene, as well as the motion of Texas for leave to file an amended complaint in intervention. Report at 5; A-2.

[38] New York answered the Delaware complaint on July 27, 1988, the Texas complaint in intervention on April 21, 1989, the Texas and Alabama amended complaints in intervention on November 17, 1989, and the California complaint in intervention on July 20, 1990.

[39] New York lodged its Brief in Opposition to Motion [of Delaware] for Leave to File Complaint, on May 9, 1988, and Brief in Opposition to Motions [of Alabama, *et al.*] for Leave to Intervene, on May 18, 1989.

[40] New York moved for judgment on the pleadings against Texas on May 26, 1989. On October 30, 1990, following a limited program of discovery authorized by the Special Master (and described in his Report at 5-7), New York renewed its motion, directed against all of the complaints in intervention. Delaware also moved to dismiss the complaints in intervention. Texas, *et al.* and Alabama, *et al.* responded with motions for judgment on the pleadings and partial summary judgment, respectively, and California, *et al.* requested an "initial ruling" on its legal theory.

also contended that Delaware's claim under the *Texas* backup rule, to the property held by brokers domiciled there, raised an issue of fact regarding the brokers' ability to use their records, including the delivery tickets associated with trades of physical certificates, to identify the creditor brokers of unclaimed distributions. New York urged that this facet of the case could not be explored on the basis of the limited discovery authorized by the Special Master.

In the Report dated January 28, 1992, the Special Master proposed a resolution of the competing claims essentially in line with the Texas theory advocated by Texas, *et al.* and Alabama, *et al.*[4] Pursuant to the recommendation, the primary right to escheat unclaimed distributions lies in the jurisdiction of the last known address of the ultimate intended beneficial owner of the underlying securities. If that address is unknown, or is in a jurisdiction that does not provide for the escheat, then the right falls to the jurisdiction where the issuer of the underlying security has its principal executive offices. If the issuer's identity is unknown, or the jurisdiction of its principal executive offices does not have coverage for the property, then the jurisdiction where the holder has its principal executive offices is the proper recipient. In each instance, the recommendations preserved the right of a jurisdiction to assert a superior claim to the property if and when its laws made provision for the escheat. Report at A-2 to A-4.

With the exception of using a new locational test under the backup rule based upon principal executive offices, the Special Master viewed his recommendations as the product of resolving ambiguities in the Court's precedents. *See, e.g.*, Report at 28-32. He proposed using the chief executive office, rather than domicile, to locate the debtor as a more equitable but equally convenient alternative. *Id.* at 40-50. Finally, the Special Master accorded full retroactive effect to his recommendations. *Id.* at 70-77.

---

[4] The Special Master circulated a Draft Report for comment by the parties on June 21, 1991. Report, at 7-8.

B. The Legal Analysis

a. The Dual Debtor Conundrum

The Special Master believed that this case was novel in that it presented the necessity of choosing between two distinctive uses of the term "debtor" in order to apply the *Texas v. New Jersey* backup rule. Report at 34. On the one hand, an issuer is no longer a debtor after it makes a payment to the registered owner, as evidenced by U.C.C. § 8-207(1). *Id.* at 25. The registered owner has the acknowledged debt. On the other hand, the registered owner has no ownership rights to the funds (having received an overpayment), leaving the issuer as the entity with the last claim to the funds as an asset.

Having postulated a split in the debtor's identity, the Special Master proceeded to eliminate the payment obligation of the registered owner as determinative of the jurisdiction entitled to escheat the funds under the *Texas* backup rule. He stated that "[w]hile federal common law rules, such as the Supreme Court's rules governing the resolution of conflicting claims of escheat cannot (and should not) operate in a vacuum, ignoring all state-law rules, it does not follow that federal law must track one particular manifestation of a state law rule." Report at 25-26. The state law rule which the Special Master believed to be expendable for escheat jurisprudence was U.C.C. § 8-207(1).

> But the effect of issuer protection provisions such as U.C.C. § 8-207(1), whether conceived of as substantive rules or affirmative defenses, is not, even under state law, a declaration that *ownership* of the funds in issue shifts from issuer to intermediary to beneficial owner. Issuers are acquitted of a responsibility but the intermediaries do not necessarily acquire the rights of owners at that point; indeed, it is this understanding that sets in motion the very possibility of escheat.

Report at 26.

The Special Master then turned to the decisions in *Texas v. New Jersey* and *Pennsylvania v. New York* and concluded that

there, the Court did not use the term "debtor" (or "creditor") in any specific state law sense.

> All this is by way of saying that the Court's use of the terms "debtor" and "creditor" in *Texas v. New Jersey* and *Pennsylvania v. New York*, seems to be more descriptive - an attempt to identify the relevant parties - than prescriptive legal commands, carrying the kind of definition one might find, for example, in the Uniform Fraudulent Transfer Act. It seems to me that the Court's use of these terms was not intended to send courts (or Special Masters), in subsequent cases, in search of particular state-law definitions of "debtor" and "creditor" (which may, in any case, vary from state to state and context to context).

Report at 29-30 (footnote omitted).

Accordingly, the Special Master characterized his role in this case as "search[ing] for parties with relevant *attributes*, for purposes of escheat jurisprudence." Report at 30. Under this "relevant attributes" scrutiny, the Special Master concluded that the term "debtor" could still refer to the registered owner.

> The term "debtor" could refer to an entity that, at a particular point in time, had a legal obligation to turn the funds over to the "creditor". This would point to the position of Delaware and New York . . . .

Report at 31-32. However, the Special Master went on, the term "debtor" could also refer to the issuer of the underlying security.

> But the Court's use of the term "debtor" could also descriptively refer, under these circumstances, to the last owner of the funds, in the sense of the last person who had a claim to the funds as an asset that would be appropriately reflected in the net worth of the entity in question. This would be . . . the issuer in the instant case.

Report at 32.

Turning once again to the decisions in *Texas v. New Jersey* and *Pennsylvania v. New York*, the Special Master found no precise answer to the question of which of the entities, the issuer or the registered owner, had the more relevant debtor attributes.

> Thus, in neither case was the Court faced with a need to choose between two distinctive uses of either the term "debtor" or the term "creditor." This case, however, presents just such a need.

Report at 34.

In the end, the Special Master called upon the principles of certainty and fairness to resolve the dilemma which he had posed. In terms of certainty, the Special Master found no preference between use of the issuer's domicile or that of the record holder. Report at 34. In terms of fairness, however, he found that using the issuer's domicile won out. *Id.* at 35.

The particular concept of fairness which the Special Master had in mind at this point in his analysis was not a more even distribution of the funds among the States. Report at 35. Rather, he linked fairness to rewarding the jurisdiction that had "a claim to benefitting the 'company whose business activities made the intangible property come into existence.' " *Id.*[a] By contrast, the Special Master saw nothing fair about rewarding the jurisdiction of the registered owner, relying on his misconception that it was that entity's "records (or lack thereof) [that] created the problem that resulted in the escheatable property in the first instance." Report at 36.

Finally, despite the evidence in the record to the contrary, the Special Master concluded that "a focus on the location of the issuer is simple and inexpensive to implement." Report at 39.

---

[a] The quoted language is from *Texas v. New Jersey*, 379 U.S. at 680, erroneously attributed by the Special Master to *Pennsylvania v. New York*.

He perceived the different administrative burdens as "differences of a minor degree" which should not control the result. *Id.*

Having identified the issuer as the debtor, the Special Master examined the other component of the *Texas* backup rule, the proxy for locating the debtor. Report at 41. Whereas the Court used the jurisdiction of incorporation, the Special Master recommended a change to the jurisdiction of chief executive office. *Id.* He concluded that in the years following the Court's rejection of a principal place of business test in *Texas v. New Jersey*, 379 U.S. at 680, the concept of chief executive office had attained the requisite certainty to qualify as a locational proxy. *Id.* at 42-44. The Special Master reiterated the Court's view that such a proxy was inherently more persuasive than one which depended upon the happenstance of corporate domicile. *Id.* at 45-46. Finally, the Special Master endorsed the change in the locational test under the *Texas* backup rule because "it also is more likely to distribute the funds, in this and other cases, fairly among the various jurisdictions." *Id.* at 50. In particular, the Master was concerned about the disproportionate share of the funds that would accrue to Delaware if issuers were located by their domicile. *Id.* at 47.

b. **The Ultimate Beneficial Owner As Creditor**

The Special Master found less difficulty in identifying the relevant attributes of a "creditor."

> One attribute seems to dominate both as a matter of logic and as a matter of the internal structure of the Court's prior cases. A legal right to the funds, as beneficial "owner," under whatever basis, makes one a "creditor."

Report at 31. Having identified the "ultimate intended beneficiary" as the creditor (Report at 64), the Special Master concluded that New York could not prevail on its claim under the *Texas* primary rule as the State of last known address of the creditor brokers.

Central to the Special Master's reasoning was his statement that creditor brokers have no beneficial ownership interests in the funds in question.

> Only if it could be further determined that the identified bank or broker was trading for its own account, or was otherwise the beneficial owner of the distribution (such as might be the case if the identified bank or broker had paid the beneficial owner originally), would it be sensible to launch an effort to locate that bank or broker. The difficulty, however, is that there is no basis to presume this conclusion.

Report at 65-66. According to the Special Master, "it is almost never the case that an intermediary acting other than for its own trading account will have a claim as a creditor." *Id.* at 66, n.57.

The remainder of the Special Master's analysis rejecting New York's position under the primary rule focused on the rule's provision for locating the jurisdiction of the creditor, *i.e.*, the creditor's last known address on the debtor's books and records. The Special Master concluded that even if creditor brokers had beneficial ownership interests in the funds, New York's claim would fail because it was based upon a presumption that the creditor brokers' last known addresses were in New York. Report at 58-59, 62-63, 66-67.

First, the Special Master noted New York's suggestion, originally set forth in the Robert Griffin Affidavit, that "[a] far less time - consuming and costly alternative to attempting reconstruction of every overpayment transaction, and one which would be almost as accurate, would be to use representative samples from each debtor broker." Brief in Opposition to Motion for Leave to File Complaint, A-5. The Special Master viewed this as "essentially asking for the adoption of a legal standard for presuming addresses that are in fact unknown." Report at 59, n.50.

Second, the Special Master opined that the address on the debtor brokers' books, even if known, might not correlate with a creditor broker. Report at 62-63. In other words, if the broker so located traded the underlying security to another broker prior to the record date, it would owe the distribution to that broker.

C. The California, *et al.* Theory[43]

The Special Master rejected the theory raised by the States led by California because it altered precedent in order to achieve greater geographic diversity for escheat of the funds.

> California, *et al.*, in short, would have the Court now do what it refused to do under the circumstances of *Pennsylvania v. New York*. In the view of California, *et al.*, a rough, aggregate concept of fairness could be attained through adoption of a gross formula that would, in some approximate fashion, reflect where the nation's beneficial owners lived or conducted commercial activities.

Report at 51. In addition, the Special Master concluded that an equivalent diversity was attainable through the *Texas v. New Jersey* backup rule as interpreted by him, "without adding a further fiction to the concept of the beneficial owner's location." Report at 52.

In discussing the relevance of *stare decisis*, the Special Master said:

> There is virtue in clear rules, and in discouraging parties from routinely challenging those rules as not quite right for their particular case.

Report at 53. In the Special Master's opinion, a change in the Court's basic rules with respect to a particular type of transaction

---

[43] New York does not take issue with the Report's analysis of the California, *et al.* theory, but contends that factors recognized by the Special Master as defeating that theory also apply to the theory of Texas, *et al.* and Alabama, *et al.*

is best left to Congress, citing the statutory solution adopted in response to *Pennsylvania v. New York*.[44]

> Fashioning precise fairness rules to handle a relatively unique, complex, and significant (in terms of dollar) case (as this case is) . . . seems best addressed by Congress.

Report at 54.

Finally, the Special Master found serious administrative difficulties inherent in the California theory. He noted, for example, that "unless all jurisdictions have the same period for escheat, the funds might be partially escheated at any given time, with other funds continued to be held by the intermediary." Report at 54, n.48.

D. Reachback Period[45]

The Special Master concluded that New York must "disgorge" all of the funds in question that it has escheated, other than those for which New York can show that it is the location of the issuer's principal executive offices. Report at 76. Although

---

[44] Congress enacted legislation to establish the entitlement to escheat any unclaimed sum payable on a money order, travelers check, or other similar instrument (other than a third party bank check), on which a banking or financial organization or a business association is directly liable. 12 U.S.C. §§ 2501, *et seq*. Under the statute, the primary right of escheat is given to the State of purchase as shown on the debtor entity's books and records. 12 U.S.C. § 2503(1). This reflected Congress' findings that such books and records do not show a last known address for the purchaser, and a substantial majority of purchasers reside where the instruments were purchased. 12 U.S.C. § 2501(1), (2). The backup provision conferred the right of escheat upon the State where the debtor entity's principal place of business was located. 12 U.S.C. § 2503(2),(3).

[45] The issue of retroactivity appears in Part IV of the Report, which includes an analysis of Delaware's minimum contacts concerns (Report at 68-70), and a discussion of implemental considerations (*id*. at 77). New York excepts to these portions of the Report to the extent that they subsume the correctness of the Texas, *et al*. and Alabama, *et al*. theory on the merits.

the Special Master "admit[ted] to being troubled" by the financial impact that a disgorgement of such "magnitude" would have, he took consolation in his belief that there would be practical limitations stemming from the fact that records may "no longer exist that reveal who the issuers were of funds that became 'stuck' in the 1970s or earlier." *Id.* at 76, 77. He also attributed much of New York's anticipated hardship to the fact that it spent the money rather than maintaining a larger reserve fund (citing the New York State Finance Law § 95). *Id.* at 76, n.68.

The Special Master's retroactivity analysis centered on *Chevron Oil v. Huson*, 404 U.S. 97 (1971). Report at 72. Although he expressed some reservation as to whether *Pennsylvania v. New York* precluded application of the *Chevron Oil* doctrine, he concluded that New York could not, in any event, satisfy the first prong of the doctrine - the establishment of a "new principle of law." In the Special Master's opinion, his disposition was "a logical interpretation of prior precedents in this area." Report at 71-73. Turning, then, to the question of remedial limitations, the Special Master found none available to New York under a statute of limitations or laches defense. *Id.* at 74-75.

SUMMARY OF ARGUMENT

In *Texas v. New Jersey*, this Court announced a "clear rule" to govern the escheat of abandoned intangible property, to be applied to "all types of intangible obligations" and "to which all states may refer with confidence." 379 U.S. at 678. The rule requires that intangible property escheat to the State of the creditor's last known address on the debtor's books and records (primary rule). If the creditor's last known address does not appear on the creditor's books, or is in a State that does not provide for escheat of the property in question, then the State of the debtor's domicile may escheat the funds until another State comes forward with proof of a superior claim (backup rule). *Id.* at 682. Thus, the application of the Court's rules to the various types of abandoned intangible property requires only the identification of the debtors and creditors of the property. The property involved in this case consists of unclaimed dividend, interest, and stock dividends on stocks and bonds paid to New York brokers, New

York banks and DTC and owed to unknown creditors or New York addressed creditors.

The application of the *Texas* escheat rules to the property in question is straightforward because the debtors and creditors of this property are fixed by uniform commercial law principles codified in the Uniform Commercial Code (U.C.C. § 8-207), which all States and the District of Columbia have adopted in relevant form. Pursuant to state law, the issuer of the underlying securities is the debtor of the distribution only to the stockholder or bondholder of record. Upon paying the record holder, the issuer's debt is satisfied and its rights in the property cease. *See* U.C.C. § 8-207(1). The record holder is the debtor of any distributions that become abandoned in its possession. The creditor is the owner of the property entered on the record holder's books and records regardless of whether it has beneficial ownership interests in the property that could be established as a matter of fact.

Pursuant to these uniformly established principles of commercial law, New York escheats the unclaimed distributions held by record holders that are domiciled in New York and have no record of a creditor on their books. These entities are New York custodian banks and DTC, a securities depository incorporated under New York's banking law. The unclaimed distributions held by brokerage firms in New York, by contrast, are owed to creditors that are identifiable from the debtor brokers' books and records. The creditors are the brokers and banks that purchased the underlying securities but were not paid the distributions to which they were entitled. New York escheats this property because it can demonstrate that in virtually all instances, the debtor brokers' books identify creditor brokers and banks with New York addresses. The right of a State to demonstrate a superior claim to abandoned property under the *Texas* primary rule is central to the Court's escheat precedents.

The Special Master rejected New York's claims to the property in question because he concluded that the Court did not intend to use the terms debtor and creditor according to their state law meanings, nor, indeed, according to their commonly accepted

usage. Rather, the Master concluded that the Court used these terms as "shorthand" provisions for merely identifying persons or entities with debtor and creditor "attributes." Under this novel approach, he concluded that the debtors of the property were the issuers of the securities because they were the last to have "a claim to the funds as an asset that would appropriately be reflected in the net worth of the entity in question." Report at 32. In identifying the creditors, the Special Master ignored the record holders' recorded debts to creditor brokers and banks in favor of parties with "ultimate intended" beneficial ownership interests in the property. *Id.* at 64.

The Special Master's definitions of the debtors and creditors of the property in question are contrary to the Court's escheat precedents (and the States' escheat laws), which expressly recognize that intangible property is a debt and that the "asset" is the right to enforce the payment obligation, not the underlying property from which it is derived. Accordingly, the Court specifically referred to the debtor as the obligor subject to the payment demand, and the creditor as the obligee or apparent owner on the debtor's records who had the right to the payment obligation. *See, e.g., Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951). The Court did not alter these understandings of the debtor and creditor when it announced the *Texas* rules of priority. In *Texas v. New Jersey*, the Court used the terms debtor and creditor without defining them. It thereby demonstrated its intent to rely on state law in this context as it had done previously.

It was therefore incumbent on the Special Master to apply the Uniform Commercial Code in defining the debtor-creditor relationships for the property in question unless its definitions proved to be incompatible with the purposes of the *Texas* escheat rules. The Special Master could not find any disharmony, however. State law is uniform in its provision that the issuers' debt is discharged upon paying a distribution to the record holder. Indeed, as the Special Master recognized, without such a release the payment of distributions would not be possible. Moreover, escheat by the record holders' jurisdictions under the

Texas backup rule is demonstrably easier than escheat by 51 jurisdictions according to the issuer's domicile (or chief executive office). Reliance on state law thus accomplishes the Court's goals under the *Texas* backup rule of certainty and ease of administration.

In order to reject state law, the Special Master reached beyond the Court's precedents by adopting a "fairness" standard under the backup rule. It was also necessary for him to give content to the standard since the Court never articulated one in this context. The fairness test which the Special Master adopted rewarded the jurisdiction that benefitted the company whose business activities gave rise to the distributions. Report at 35. Even if a fairness test were appropriate in applying the backup rule, the jurisdictions of the record holders have an equal or better claim to the property. These entities - securities depositories, brokers and custodian banks - not only make corporate and governmental investment possible, they are foremost in seeking to eliminate the single operative cause of the unclaimed distributions involved here, the certificated security.

Equally untenable is the Special Master's rejection of the apparent owner of the property on the debtor's books as the creditor under the *Texas* primary rule, in favor of a party with "ultimate beneficial ownership" interests in the property as an asset. Under the primary rule, the Court required that the creditor be identified from the debtor's books and records. The Court never looked beyond the debtor's books to identify the creditor because it always identified the creditor's asset as the right to the payment obligation, not to the underlying property from which it derived. Moreover, defining the creditor by actual beneficial ownership rights in the underlying property results in a fact-oriented approach which is contrary to the Court's stated concern for a uniform rule.

The Special Master's definition of the creditor is fundamentally at odds with the *Texas* rules because it relates to parties that *cannot* be identified from the debtors' books. "Ultimate intended beneficial owners" are never discernible from the debtor

brokers' records and, in any event, have been paid the distributions to which they were entitled in virtually all instances by their own brokers (the creditor brokers and banks). By ignoring the creditor brokers and banks on the debtor's books in favor of entities or persons that cannot be identified from the debtor's records, the Special Master has made it impossible to apply the *Texas* primary rule. The Master has thus reversed the priorities established by the Court in *Texas v. New Jersey*.

Even under the Master's "ultimate" creditor attributes test, the creditor brokers and banks qualify as creditors because they have beneficial ownership interests in the property. These entities routinely pay their customers, the beneficial owners, all of the distributions to which they are entitled. If the creditor brokers or banks are underpaid the distributions that they have already paid to the beneficial owners, they are entitled to keep the funds they subsequently collect. The Special Master's refusal to recognize the beneficial ownership rights of creditor brokers and banks warrants the conclusion that his designation of the creditors as the "ultimate intended beneficial owners" was a mere formalism that has no relation to the Court's escheat rules. The Special Master's "ultimate" goal was the dispersal of the property escheated by New York to the various States, a usage of the *Texas* rules which the Court rejected in *Pennsylvania v. New York*, 407 U.S. 206 (1972).

Finally, if the Court were to adopt the Special Master's Report, it should do so prospectively since the Report proposes revisions in rules announced by the Court in the exercise of its original rule-making jurisdiction. If the Court were to apply the standard retroactivity analysis of *Chevron Oil v. Huson*, 404 U.S. 97 (1971), this case satisfies its various prongs. The recommendations of the Special Master constitute fundamental changes of law that could not have been reasonably anticipated. The Special Master's definitions of the debtors and creditors of the property in question are inconsistent with the Court's escheat decisions, the States' own escheat laws incorporating those decisions, and uniform state commercial law principles that adopt the usual meanings of the terms debtor and creditor. The

Master's usage of the *Texas* rules, moreover, ignores the priority which the Court gave to the creditor's jurisdiction, and imposes an unprecedented (and invalid) fairness test under the backup rule to allocate property to the various States.

Under the second *Chevron Oil* prong, the disruption of New York's genuine reliance interests is amply demonstrated by the fact that the Special Master's recommendations are contrary to the understanding of the *Texas* rules embodied in the uniform abandoned property acts and the States' abandoned property laws. The States have applied the *Texas* rules in the same way that New York has. The imposition of unlimited retroactive liability on New York, moreover, will result in fiscal and administrative burdens of devastating proportion. The "confidence" which the Court hoped to instill in the States through its escheat rules will be eroded by retroactive liability imposed after the rules are changed. *Texas v. New Jersey*, 379 U.S. at 678.

ARGUMENT

POINT I

THE RECORD HOLDER IS THE DEBTOR OF THE PROPERTY IN QUESTION UNDER THE *TEXAS V. NEW JERSEY* BACKUP RULE

The Special Master concluded that the issuer of the securities distributions, rather than the obligor or holder of the property, was the debtor under the *Texas* backup rule based upon his (1) interpretation of the Court's precedents; (2) refusal to apply the uniform commercial law principle that the issuer's debt is discharged upon payment of the distribution to the record holder; and (3) predilection for using the *Texas* backup rule to allocate the property to the States. None of these rationales is consistent with *Texas v. New Jersey* or *Pennsylvania v. New York*. In addition, the Special Master's analysis is inconsistent with the Court's earlier escheat decisions, which clearly identify the debtor of abandoned intangible property as the obligor or holder. *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *Anderson*

Nat. Bank v. Luckett, 321 U.S. 233 (1944); *Security Savings Bank v. California*, 263 U.S. 282 (1923).

A. The Court's Precedents Consistently Apply The Term Debtor To The Obligor Or Holder Of Abandoned Intangible Property

The Special Master incorrectly interpreted *Texas v. New Jersey* and *Pennsylvania v. New York* as raising an ambiguity in the Court's use of the term "debtor." It is evident from these decisions that the debtor refers to the obligor, the entity that owes the property to someone else.

In *Texas v. New Jersey* the property in question consisted of

> various small debts totalling $26,461.65 which the Sun Oil Company for periods of approximately seven to 40 years prior to the bringing of this action owed to approximately 1,730 small creditors who have never appeared to collect them. The amounts owed, most of them resulting from failure of creditors to claim or cash checks, are either evidenced on the books of Sun's two Texas offices or are owing to persons whose last known address was in Texas, or both.

379 U.S. at 675 (footnote reference omitted).

It is apparent from the Court's description of the property that Sun Oil was considered the debtor because of its outstanding payment obligations, represented by the uncashed checks and various other indicia of indebtedness. There is simply nothing, express or implied, in the Court's discussion that would warrant the conclusion that the term debtor could ever be applied to an entity that had satisfied its payment obligation. Indeed, the Special Master characterized the Court's opinion as follows:

> . . . the opinion treated the unclaimed funds as if they were funds held by Sun Oil that simply had never been claimed by the appropriate creditor - in other words,

> treating this case as if it involved a rather simple "debtor-creditor" relationship. . . .

Report at 18.

Nevertheless, the Special Master concluded that the Court did not intend to limit the application of the *Texas* backup rule to the jurisdictions of the obligors. He relied on two factors in this regard, neither of which is credible. First, he noted the fact that when the Court announced the backup rule, it referred to "escheat by the State of corporate domicile," not "debtor's" domicile. Report at 18 (citing 379 U.S. at 682). *See also* Report at 28. Second, the Special Master stated that the underlying Report of the Special Master in *Texas v. New Jersey* indicated that "several categories of distributions . . . were held by intermediary banks and paying agents rather than Sun Oil, but the Court did not on that account launch into an inquiry as to whether Sun Oil remained a debtor or not." Report at 28; *see also id.* at 18, 32-34, 37. The Special Master speculated, therefore, that the Court was concerned with debtors in the sense of the originators of the debt, not the obligors.

Concerning the Court's reference to "corporate domicile" in the context of the backup rule, it can only be read to refer to Sun Oil, not to corporate issuers or debt originators generally, and to subsume the Court's prior discussion of Sun Oil as the obligor. In fact, the Court, in its Final Decree, makes clear that its reference to "corporate domicile" was a specific reference to Sun Oil.

Equally spurious is the Special Master's belief that the Court's disregard of the intermediaries holding Sun Oil's funds could be construed as a lack of concern for the obligor in delineating the debtor under the backup rule. The concise response to the Master is that Sun Oil's status as the obligor of the funds was never in dispute.

> In its answer, the Sun Oil Company admits that it owes the obligations in question and its willingness to pay them to the State found entitled thereto by the

> judgment of this Court. It asserts no claim to any of the funds in controversy.

Report of the Special Master, *Texas v. New Jersey*, at 4.

Moreover, the intermediaries in possession of Sun Oil's funds were Sun's agents. Although the Special Master here suggested that there was some doubt as to the capacity in which the intermediaries held the funds, that is not evident from the Special Master's Report in *Texas v. New Jersey*. To the contrary, that Report demonstrated that the entities involved were banks that functioned as Sun's paying agents and transfer agents. Report of the Special Master, *Texas v. New Jersey*, at 5, 11, 12-13. Since Sun's debt obligations were unaffected by the location of its assets, the existence of the intermediaries was irrelevant to the Court's discussion of the backup rule. Clearly, under all of these circumstances, *Texas v. New Jersey* does not permit the conclusion that the Court used the term "debtor" as "shorthand" to identify parties with "debtor attributes" rather than the obligor of the debt. *See* Report at 28-30.

Precisely the same conclusion must be drawn from the Court's decision in *Pennsylvania v. New York*. In that case, the Court adopted the Special Master's reasoning that the nature of Western Union's obligation was that of a "common debt." Report of the Special Master, *Pennsylvania v. New York*, at 15. Accordingly, there was no dispute that Western Union was the debtor for the purpose of applying the *Texas* backup rule, based upon its obligation to pay the funds to the payee or return them to the sender. The Court's sole concern was whether the backup rule should be utilized when the debtor-obligor (Western Union) did not routinely record the addresses of the parties to whom it owed the funds.

The Special Master's tendency to confound the Court's decisions is nowhere more evident than in his analysis of *Pennsylvania v. New York*. He contended that the Court did not use strict debtor-creditor terminology in that case because "it would be possible to view Western Union as a bailee for hire - an

agent of the sender - and not as a debtor in a transaction where the sender was the creditor." Report at 28. Further, stated the Master, if there was an underlying debt, "the sender remained the payee's debtor until the obligation that was the subject of the money order was satisfied." *Id.* at 28-29. Based on this, the Master concluded that the Court's references to Western Union as the debtor, and to the sender and payee as creditors, were merely "descriptive." *Id.* at 29.

The Special Master's strenuous effort to demonstrate that the Court was not concerned with "technical" state law definitions of debtors and creditors goes too far. It misses the point that Western Union was the debtor because it had an outstanding payment obligation, and the sender and payee were creditors because either could claim the funds back from Western Union. Indeed, the Court considered Western Union's payment obligation to be a common debt because Western Union was a debtor-obligor in accordance with usual commercial law understandings. It was, therefore, contrary to the Court's specific references to Western Union as the debtor for the Special Master to have concluded that its domicile was permitted to escheat "simply because Western Union was in possession of the funds." Report at 36-37.

All of this was but a preamble to the Master's attempt to reconcile *Pennsylvania v. New York* with his ultimate conclusion that the debtor of the property involved here is the issuer - "the last owner of the funds, in the sense of the last person who had a claim to the funds as an asset that would appropriately be reflected in the net worth of the entity in question." Report at 32. Even if this unorthodox definition of a debtor were tenable, it is inconsistent with the Master's own conclusion that Western Union was a debtor. Clearly, Western Union could not satisfy the test of having a claim to the funds as an asset that could be reflected in its net worth. The sender, however, could have satisfied this test, but as the Master recognized, the Court identified the sender as a creditor, not a debtor. These contradictions in the Master's analysis of *Pennsylvania v. New York* stem from the fact that the Master defined the terms debtor and creditor in novel ways never contemplated by the Court.

Thus, as interesting as the Master's analysis may be, it is contrary to the Court's decision and incompatible with the Court's concern for certainty in its escheat rules. The intellectual gymnastics that were required to construe *Pennsylvania v. New York* as supporting the proposition that issuers are debtors after paying their debts destroys any semblance of predictability in the Court's escheat jurisprudence. The only consistent and logical reading of *Pennsylvania v. New York* is that the Court applied the backup rule to Western Union because it was the obligor. In so doing, and by treating the sender and payee as Western Union's creditors, the Court further demonstrated its unwillingness to plumb the origins of the payment obligation as a predicate for identifying the debtor. In short, an issuer, shorn of its obligation to pay, is irrelevant to the operation of the *Texas* backup rule.

Finally, the Court's uniform application of the term "debtor" in its earlier escheat decisions to the obligor, regardless of the diverse origins of the debt, clearly informs the Court's intended meaning of that term in *Texas v. New Jersey* and *Pennsylvania v. New York*. In this regard, the Special Master was in error when he concluded that the Court's earlier decisions "support a *right* to escheat by the jurisdiction where the issuing corporation is located." Report at 32 (citing *Standard Oil v. New Jersey*, 341 U.S. 428 (1951) ("*Standard Oil*"); *Anderson Nat. Bank v. Luckett*, 321 U.S. 233 (1944) ("*Anderson Nat. Bank*"); *Security Savings Bank v. California*, 263 U.S. 282 (1923) ("*Security Savings Bank*")).

In each of these cases, the Court was concerned only with the right of a State to escheat or take custodial possession of abandoned intangible property when no other State had asserted a claim to the same property. In that circumstance, the Court recognized the right to escheat if the State acted pursuant to a valid exercise of its own jurisdiction. The State thereby satisfied the requirements of due process by affording notice to the absent owners of the transfer of the property to it while protecting the debtor from the possibility of having to pay the debt twice.

The Court concluded that a State's escheat procedures satisfied due process if they provided for personal service on the debtor and adequate notice by publication to the absent owners. Personal jurisdiction over the debtor was the means by which the State seized the abandoned property, since the Court equated intangible property with the obligation to pay the debt. The State thereby obtained the power to compel the debtor to pay the property to it, either for purposes of taking title (escheat), or conservation (custodial appropriation), until the rightful claimant appeared. The seizure also supplemented the notice to absent owners. *See Standard Oil*, 341 U.S. at 439.

Because the Court was concerned with the obligation to pay, not with a prior beneficial ownership interest, its decisions applied the term debtor to banks as well as to securities issuers.

> The contract of deposit does not give the bank a tontine right to retain the money in the event that it is not called for by the depositor. It gives the bank merely the right to use the depositor's money until called for by him or some other person duly authorized.

Security Savings Bank, 263 U.S. at 286; *see also Anderson Nat. Bank*, 321 U.S. at 241-242.

> The rights of the owners of the stock and dividends come within the reach of the court by the notice, *i.e.*, service by publication; the rights of the appellant [issuing corporation] by personal service. That power enables the escheating state to compel the issue of the certificates or payment of the dividends.

Standard Oil, 341 U.S. at 440; *see also id.* at 436, where the Court expressly referred to the debtor as the "obligor or holder."

Accordingly, the Court's earlier escheat decisions refute the Special Master's conclusion that "it is more consistent with the precedent to support escheat (or custodial taking) by the jurisdiction that was connected with the entity that was the originator of the transaction (or the original owner of the funds)" over the

jurisdiction of the obligor. Report at 38. Since the obligation to pay the debt was viewed as the crux of the State's exercise of its dominion over the intangible property, it was the essence of the term "debtor."

The *Texas v. New Jersey* rule, which the Court subsequently adopted to resolve competing State claims to abandoned intangible property, preserved the concept of the debtor as the obligor. Although the primary right of escheat was accorded to the jurisdiction most closely associated with the creditor, rather than the debtor, the underlying intangible property was still defined as a "liability" in the hands of the debtor. *Texas v. New Jersey*, 379 U.S. at 680. The Court's conclusion that fairness required it to treat the debt as property of the creditor simply construed the debtor's obligation to pay as the creditor's asset. The debtor remained the obligor or holder because it was required to satisfy a demand for payment. *See* Report of the Special Master, *Texas v. New Jersey*, at 35.

The fact that the holder of the payment obligation is quintessential to the operation of the *Texas* backup rule is further evident from the Court's reliance on that obligation, as recorded on the debtor's books and records, to determine the creditor's jurisdiction under the primary rule. It is thus apparent that the Special Master's perception of an ambiguity in the Court's precedents concerning the meaning of the term "debtor" is unfounded. The Court has consistently applied that term to the holder of the payment obligation, not to the individual or entity that had a prior claim to the funds as an asset.

B. The Special Master's Novel Definitions Of The Debtors And Creditors Is Also Contrary To The Uniform Abandoned Property Acts And The States' Abandoned Property Laws

The conclusion that the Special Master has erroneously applied the *Texas* rules to the issuer and ultimate intended beneficial owners of the property in question is further demonstrated by the fact that this result conflicts with the

uniform abandoned property acts and the States' own abandoned property laws. This universal body of state law accords with the Court's escheat precedents which define the debtor as the obligor or holder of the debt, and the creditor as the obligee or apparent owner of the right to payment reflected on the holder's books.[46]

The Uniform Abandoned Property Act of 1981, upon which many States modeled their abandoned property laws, incorporated the *Texas v. New Jersey* rule for determining the States' priority in escheating abandoned intangible property. *See* Uniform Act, § 3 (General Rules for Taking Custody of Intangible Unclaimed Property).[47] The Act provides that the holder of unclaimed property is the debtor for purposes of escheat.

> § 2 Property Presumed Abandoned; General Rule
>
> (a) Except as otherwise provided by this Act, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is

---

[46] Because the States have applied the *Texas* rules to the property at issue in the same way that New York has, the changes in the rules proposed by the Special Master, if adopted by the Court, would necessarily invalidate their escheat activities as well. To preserve its claim to property escheated by these States to which New York would be entitled under the proposed changes, New York will seek leave to set up a counterclaim by amendment pursuant to Fed. R. Civ. P. Rule 13(f).

[47] The following States adopted completely, or in relevant part, the cited provisions of the 1981 Uniform Act: Alaska (Alas. St. §§ 34.45.010 *et seq.*); Arizona (Az. Rev. St. §§44-301 *et seq.*); California (Cal. Code §§ 1500 *et seq.*); Colorado (Col. Rev. St. §§ 38-13-102 *et seq.*); Florida (Fla. St. Anno. §§ 717.001 *et seq.*); Georgia (Off Code of Ga. Anno. §§ 44-12-190 *et seq.*); Hawaii (Haw. Rev. St. Anno. §§ 523A-1 *et seq.*); Idaho (Id. Code §§ 14-501 *et seq.*); Louisiana(La. Rev. St. §§9:151 *et seq.*); Maine (33 Me. Rev. St. Anno. §§ 1801 *et seq.*); Montana (Mont. Code Anno. §§70-9-101 *et seq.*); New Hampshire (NH Rev. St. Anno. §§ 471-C:1 *et seq.*); New Jersey (NJ St. Anno. §§46:30B-1 *et seq.*); New Mexico (NM St. Anno. 1978 §§ 7-8-1 *et seq.*); North Carolina (NC Gen. St. §§ 116B-10 *et seq.*); North Dakota (ND Cent. Code Anno. §§ 47-30.1-01 *et seq.*); Rhode Island (Gen. Laws of RI 1956 §§ 33-21-1 *et seq.*); South Carolina (SC Code 1976 §§ 27-18-10 *et seq.*); Texas (Texas Code Anno., §§ 72.101 *et seq.*); Utah(Utah Code Anno. §§ 78-44-1 *et seq.*); Washington (Rev. Code of Wash. Anno. §§ 63-29-010 *et seq.*); Wisconsin (Wisc. St. Anno. §§ 177.01 *et seq.*).

held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than 5 years after it became payable or distributable is presumed abandoned.

(b) Property is payable or distributable for the purpose of this Act notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

The term "holder" is defined in § 1(8) of the Act as follows:

(8) 'Holder' means a person, wherever organized or domiciled, who is:

(i) in possession of property belonging to another

(ii) a trustee, or

(iii) indebted to another on an obligation.

Where, however, the holder is acting in an agency or fiduciary capacity for a business association alone (*e.g.*, a paying agent) the business association is deemed the holder (or debtor) under § 12 of the Act, as follows:

(12) Property held by Agents and Fiduciaries

* * *

(c) For the purpose of this section, a person who holds property as an agent for a business association is deemed to hold the property in a fiduciary capacity for that business association alone, unless the agreement between him and the business association provides otherwise.

(d) For the purpose of this Act, a person who is deemed to hold property in a fiduciary capacity for a business association alone is the holder of the property only insofar as the interest of the business association in the property is concerned, and the business association is the holder of the property insofar as the interest of any other person in the property is concerned.

With regard to the creditor, the 1981 Act looks to the last known address of the apparent owner, as shown on the books and records of the holder. The term "apparent owner" is defined in §1(2) as follows:

> (2) "Apparent Owner" means that person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

Other States (as well as the District of Columbia) adopted versions of the 1954 Uniform Disposition of Unclaimed Property Act, or the 1966 revision of that Act.[*] The Act, both originally and as revised, also provides that the holder is the debtor of the property. The term "holder" is defined in § 1(d) of the 1966 revision as follows:

> (d) 'Holder' means any person in possession of property subject to this Act belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this Act.

An examination of the Texas abandoned property statute, which is based upon the 1981 Uniform Act, is illustrative of the States' longstanding practices governing their escheat of unclaimed securities distributions. Under Texas law, the debtor is the holder, and the creditor is the apparent owner (not beneficial

---

[*] The following States have adopted completely, or in relevant part, the provisions of the 1954 Act or the 1966 Revised Act. The *1954 Act*: Maryland (Md. Code Commercial Law §§ 17-101 *et seq.*); Vermont (27 Vt. St. Anno. §§ 1208 *et seq.*); West Virginia (W. Va. Code §§ 36-8-1 *et seq.*). The *1966 Revised Act*: Alabama (Code of Ala. 1975 §§ 35-12-1 *et seq.*); Arkansas (Ark. Code of 1987 Anno. §§ 18-28-201 *et seq.*); District of Columbia (DC Code §§ 42-201 *et seq.*); Illinois (Ill. Anno. St. §§ 101 *et seq.*); Indiana (Ind. St. Anno. §§ 32-9-11 *et seq.*); Iowa (Iowa Code Anno. §§ 5561 *et seq.*); Kansas (Kan. St. Anno. §§ 58-3901 *et seq.*); Minnesota (Minn. St. Anno. §§ 345.31 *et seq.*); Mississippi (Miss. Code Anno. 1972 §§ 89-12-1 *et seq.*); Missouri (Anno. Mo. Stat. §§ 447.500 *et seq.*); Nebraska (Rev. Stat. of Neb. 1943 §§ 69-1301 *et seq.*); Nevada (Nev. Rev. Stat. Anno. §§ 120A.010 *et seq.*); Oklahoma (60 Okl. St. Anno. §§ 651 *et seq.*); Oregon (Or. Rev. Stat. §§ 98.302 *et seq.*); South Dakota (S. Dak. Cod. Laws §§ 43-41-A-1 *et seq.*); Tennessee (Tenn. Code Anno. §§ 69-29-101 *et seq.*).

owner) as shown on the records of the holder. Texas escheats the property if it is the State of last known address of the apparent owner.

> (a) Tangible or intangible personal property is subject to this chapter if it is covered by Section 72.101 and:
>
> (1) the last known address of the apparent owner, as shown on the records of the holder, is in this state;

Texas Code Anno., Property, § 72.001.[49]

Accordingly, the prototypic Texas statute conflicts with Texas' own theory in this case and the one adopted by the Special Master. Since Texas intervened in this lawsuit, a number of States - Florida, Iowa, Kansas and Utah - have deemed it necessary to amend their statutes in order to conform them to the Texas theory. It does not appear, however, that any State currently has coverage for this property as the State of the issuer's chief executive office (the Special Master's proposed location in lieu of domicile for the debtor under the *Texas v. New Jersey* backup rule).

C. The Uniform Commercial Code's Definition Of The Debtors And Creditors Of The Property In Question Conforms With The Court's Escheat Precedents And State Escheat Laws

The Special Master's conclusion that the issuer is the debtor under the *Texas* backup rule after it has paid the distribution to the record owner is a radical and unprecedented departure from fundamental principles of corporate and securities

---

[49] *See also* Texas letter dated October 16, 1986, annexed as an exhibit to New York's Reply Supplemental Submission dated November 20, 1991, in which Texas claimed abandoned property from a New York debtor broker, E.F. Hutton & Company, Inc. Texas claimed the property as the State of last known address of the owner, and referred to E.F. Hutton & Co., the record holder, as the debtor.

law.[50] The issuer is a debtor only to the record owner, and only between the record date and the pay date. It is a basic principle of corporate law that "[d]eclaration of a dividend sets up a debtor-creditor relationship between the corporation and its shareholders. It creates a debt for which, if unpaid, the shareholder may sue in an action at law." G. Hornstein, 1 *Corporation Law and Practice* ¶ 472 at 594 (1959) ("*Corporation Law and Practice*") (footnotes omitted). *See also McLaren v. Crescent Planing Mill Co.*, 117 Mo. App. 40, 46, 93 S.W. 819, 821 (1906) (and cases cited); *Searles v. Gebbie*, 115 A.D. 778, 780, 101 N.Y.S. 199, 201 (4th Dep't 1906). Thus, a corporation is liable for the payment of dividends and interest only to the shareholder of record until it receives notification of a transfer. *Homestake Oil Co. v. Rigler*, 39 F.2d 40, 41 (9th Cir. 1930) ("the corporation is protected in paying dividends to the record owner until notified of assignment and right to collect the dividends."); *Munro v. Mullen*, 100 N.H. 128, 121 A.2d 312 (1956) (holder of stock on record date entitled to the dividend); *Davis v. Fraser*, 307 N.Y. 433, 121 N.E.2d 406 (1954) (a corporation cannot be held liable at the instance of the beneficial owner if, in good faith, it paid the dividends to the record owner); *Barbato v. Breeze Corp.*, 128 N.J.L. 309, 26 A.2d 53 (1942) (same); *Greasy Brush Coal Co. v. Hays*, 292 Ky. 517, 166 S.W.2d 983 (1942) (same); 11 *Fletcher Cyclopedia of the Law of Private Corporations* § 5377 at 915 (Rev. ed. L. Zajdel ed. 1986) ("*Fletcher*") (footnote omitted); 1 *Corporation Law and Practice* ¶ 472 at 593-94.

The principle has been codified in the 1977 Revision of the Uniform Commercial Code as follows:

> Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive

---

[50] *See also* DTC's previously filed Motion for Leave to File a Brief as Amicus Curiae in Support of Defendant's Motion for Judgment on the Pleadings, and Brief, dated August 7, 1989, at 3-4.

> notifications, and to otherwise exercise all the rights and powers of an owner.

U.C.C. § 8-207(1).[51]

Accordingly, when a beneficial owner is not a shareholder of record, it has no right to dividends against the corporate issuer; this is a right only belonging to the shareholder since "stock dividends are an incident of ownership of stock," 11 *Fletcher* § 5083 at 24-25 (footnote omitted). A share of stock is "the interest or right which the owner, who is called the 'shareholder,' has in the management of the corporation, and in its surplus profits." *Id.* § 5083 at 24 (footnote omitted). Whatever right a beneficial owner may have to dividends, therefore, lies solely against the record owner.

The Special Master recognized that U.C.C. § 8-207(1) releases the issuer of its obligation to pay the distribution upon paying the record holder, and that without this provision the payment of distributions would be impossible.

> As noted in the 1990 commentaries by the Permanent Editorial Board (PEB) to the Uniform Commercial Code, "[s]uch protection is clearly necessary, since, in the vast majority of cases, the issuer would have no knowledge that a transfer had been made or know the identity of the purchaser. *Inherent in this scheme is that a distribution to the registered owner will relieve the issuer from any liability* to the [subsequent] purchaser for the same distribution. Without that protection, no issuer could safely make any distribution without requiring the surrender, or exhibition, of the security by the distributee - a patently impractical requirement."

Report at 25 (citing PEB Commentary No. 4 discussing U.C.C. § 8-207) (emphasis added).

---

[51] This provision of the 1977 Official Code, or the 1977 revision quoted here (adding the word "certificated" to the 1977 Official Code), has been adopted by all 50 States, the District of Columbia and the Virgin Islands.

The Special Master recommended nevertheless that in applying the *Texas* backup rule in this case, the Court should ignore the debtor-creditor relationships established by the Uniform Commercial Code. He reached this conclusion because he believed that adherence to state law in this context was inconsistent with fairness under the *Texas* backup rule. Report at 34-35. The Special Master's analysis in this regard is erroneous.

In *Texas v. New Jersey*, the Court's purpose was to provide a means whereby the States could resolve their controversies over the escheat of intangible property.

> Since the states separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which state will be allowed to escheat this intangible property.

Texas v. New Jersey, 379 U.S. at 677. Thus, the Court's goal was a clear and uniform rule of escheat.

In giving content to such a rule, the Court was concerned with questions of fairness and ease of administration, not with creating federal common law definitions of "debtor" and "creditor." Fairness was simply a question of viewing the property as the creditor's asset rather than the debtor's, and ease of administration was satisfied by use of the creditor's last known address on the debtor's books. *Texas v. New Jersey*, 379 U.S. at 680-681 (footnote references omitted). In the context of the backup rule, the Court's concern was only for certainty and ease of administration. It concluded that resort to the debtor's domicile was "conducive to needed certainty and we therefore adopt it." *Id.* at 682.

Accordingly, the Court provided the procedural mechanisms whereby the States could resolve their disputes over the escheat of intangible property. The Court did not define the terms "debtor" and "creditor" in its rules because it had already defined

them in its prior cases according to the obligor and obligee of the debt under state law. Indeed, had the Court intended to use the terms debtor and creditor in a way other than according to commonly accepted usage (as the Special Master has done), it would have done so explicitly. In cases before the Court involving statutory construction, it has applied the rule that unless otherwise defined, words are to be given their common meaning. *See* 2A Sutherland Statutory Construction (6th ed. 1992), § 47.28, at 249, n.1 (citing *Woolford Realty Co. v. Rose*, 286 U.S. 319 (1931); *Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552 (1931); *Columbia Water Power Co. v. Columbia Elec. St. Ry. Co.*, 172 U.S. 475 (1898); *Martin v. Hunter*, 1 Wheat (14 U.S.) 304 (1816)); *see also Mallard v. United States District Court*, 490 U.S. 296, 301 (1989).

Since the Court in *Texas v. New Jersey* and *Pennsylvania v. New York* evidenced its intent to rely upon state law understandings of the debtor and creditor, it was incumbent upon the Special Master to apply state law in defining the debtors and creditors of the property in question unless doing so would be demonstrably opposed to the purposes of the *Texas* rules. Not only did the Master decline to apply U.C.C. § 8-207(1) even though he could not find a conflict between its provisions and the *Texas* rules, he made a concerted effort to avert the application of state law.[52]

---

[52] The Special Master relied upon a number of decisions of this Court for the proposition that federal interests, as expressed in federal common law and statutes, may be resolved by reference to state law only when state law is consistent with federal purposes. Report at 26 (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). *See also* discussion of *United States v. Kimbell Foods, Inc.*, 440 U.S. 715, 718 (1979), in Report at 30, n. 28. These decisions do not, however, support the Special Master's conclusion that uniform state debtor - creditor definitions should not be used in this case. In fact, the Court's escheat rules are no more than procedural devices for resolving interstate disputes over abandoned intangible property. The Court did not, thereby, create a separate body of substantive debtor-creditor law. Therefore, there is no conflict between the federal interest in uniform rules of priority and reliance upon uniform state debtor-creditor law. *See Burks v. Lasker*, 441 U.S. 471, 478 (1979), where the Court stated that in areas in which federal interests are largely regulatory, such as corporate law, legislation is generally enacted in reliance upon existing state law.

The state law definitions of the debtor and creditor established by U.C.C. § 8-207(1) advance all of the Court's concerns in formulating the *Texas* rules and should, therefore, have been followed by the Special Master. The Court's predominant concern for clear and certain rules is satisfied because all of the States have adopted U.C.C. § 8-207(1), which is essential to the payment of securities distributions. Indeed, the Special Master recognized that distributions would be impossible without U.C.C. § 8-207(1) because the issuer must be able to discharge its debt upon payment of the distribution to the record holder. Report at 25. Unlike specialized state law enactments such as the Uniform Stock Transfer Act for example (*see Standard Oil v. New Jersey*, 341 U.S. at 441, n.15), the Uniform Commercial Code provisions are fundamental.

Similarly, following state law affords the best means for administering the *Texas* rules. By virtue of recognizing the record holder as the debtor in accordance with state law, the holders of the unclaimed distributions currently report the property they hold, regardless of the underlying issue on which it was paid, to their domiciles. Contrary to the Special Master's comments, this does not reduce "to the feckless view that it is easier to escheat all funds to a single state." Report at 40, n.36. The centralization of funds in the holder's jurisdiction not only simplifies the reporting process, it also maximizes the effectiveness of State audits and other enforcement mechanisms, since all of the record holder's abandoned property is under the jurisdiction of a single authority.

In terms of the claiming process, it is more convenient for record holders, acting on their own behalf or for individuals, to present all of their claims to the jurisdiction where the reporting holder is domiciled, rather than to any of 51 jurisdictions where the issuer is domiciled. Since issuers change domiciles, and claims may be brought on many different issues, the claiming process can become very complex under the issuer - debtor theory. Moreover, the Special Master could not identify the jurisdictions which would be entitled to escheat the unclaimed distributions on foreign issues, a matter that poses no difficulty if the escheating jurisdiction is the record holder's domicile.

Although the Special Master never disputed the fact that state law implements completely the need for ease of administration under the Court's escheat rules, he nevertheless proceeded to consider the practicalities of escheat by the jurisdiction of the issuer. Report at 39. It is initially New York's position that the Master should not have explored this question, state law being fully congruent with the Court's concern for ease of administration. Even if the inquiry were appropriate, it is flawed for two reasons. First, it fails to acknowledge that escheat by the issuer's jurisdiction must be a more burdensome means of implementing the Court's escheat rules because it requires record holders to comply with the different abandoned property laws and reporting requirements of 51 jurisdictions. Second, the Master had no evidentiary basis for concluding that the issuer-debtor theory was practical. During the course of the discovery, the brokers, DTC and Citibank testified only that when they record overpayments into unclaimed distribution accounts, they generally identify the underlying security by its CUSIP, a nine-digit figure obtained by issuers from the Committee on Uniform Securities Identification when they bring an issue to market. The CUSIP does not identify the domiciles of corporate issuers, although it does identify the municipal issuers of governmental debt obligations. No testimony was elicited as to whether it was practical, or even possible to use the CUSIP to report the property to issuers' domiciles.

Well after the close of discovery, during the third round of briefing on the merits before the Special Master, the States advocating the issuer-debtor theory introduced the Affidavit of John Happersett, January 3, 1991,[53] to address the question of whether their theory was practical. The Happersett Affidavit was annexed to the reply brief of Alabama, *et al.* in support of their motion for partial summary judgment, dated January 7, 1991. Mr. Happersett purported to speak for the securities industry by virtue of his position as Unclaimed Property Coordinator at Dean Witter Reynolds, Inc., and his experience with

[53] The Report of the Special Master, at 40, n.36, mistakenly refers to the Happersett Affidavit as dated January 28, 1991.

that brokerage firm's current reporting practices. According to Mr. Happersett, it would be "practicable" to use the issue CUSIP to report unclaimed property to the issuers' domiciles by entering the domiciles into the firm's software database. Happersett Aff. at ¶ 6.

A response to the Happersett Affidavit was provided by the Securities Industry Association ("SIA"), through the head of its Dividend Division, Louis LaRocca. The SIA LaRocca Affidavit, dated February 12, 1991, addressed both the propriety of the Happersett submission and its probative value.

> The purpose of the Happersett Affidavit is purportedly to prove that the Alabama/Texas theory could be readily implemented. We understand that during the discovery phase in this action, lengthy depositions were taken of four witnesses who have personal knowledge of the procedures that would be necessary if the Alabama/Texas theory were adopted, and that counsel for the 38 intervenor states chose not to question these witnesses regarding the ease or difficulty of administration, instead they submitted an affidavit from a person whose experience and motivation have not been subject to scrutiny. The Division believes that under these circumstances, the Happersett Affidavit should be rejected. However, since the Special Master will have had the opportunity to review his affidavit, the Division, a broad - based industry group, is submitting this affidavit to set the record straight.

SIA LaRocca Affidavit at pp. 1-2.

The SIA then demonstrated the extent to which Mr. Happersett's reliance upon a computer match between an issue CUSIP and the issuer's domicile did not begin to explore the realities of attempting to implement the Texas issuer-debtor theory. A few of the problems perceived by the industry as creating questions of enormous administrative complexity were summarized as follows:

1. Each firm would have to become familiar with fifty different sets of laws and adopt procedures reflecting those laws.

2. Many states have different dormancy periods for unclaimed property and different deadlines throughout the calendar year when reports must be filed. It is conceivable that each firm would be continuously reporting unclaimed property to different states throughout the year.

3. Different states require reports in different forms. For example, three years ago, New York State began mandating the submission [of] machine readable tape files of unclaimed distributions rather than hard copy reports. Having converted a machine readable interface with New York, many firms would now have to revert to hard copy reports for other states.

4. The format of unclaimed property reports and the types of information required by each format could vary from state to state creating enormous complexity within each firm's computer system.

5. Each firm would be subject to audit by fifty states rather than one state.

6. When claims arise after unclaimed property has been escheated, each firm would have to deal with fifty states and have the procedures in place to comply with fifty different sets of claim requirements regarding affidavits, forms, etc.

SIA LaRocca Affidavit at pp. 2-3.

No further evidence was adduced concerning the impact of the Texas issuer-debtor theory on the securities industry. The Special Master resolved the ease of administration issue on this record by simply, but unaccountably, giving deference to the

statements of Mr. Happersett over those on behalf of the SIA.[54] *See* Report at 39, n.36. Thus, although the Special Master should not have reached the issue of whether the issuer-debtor theory was practical, he erroneously decided that it was on the evidentiary record before him.

D. The Special Master Rejected State Law For Reasons That Are Contrary To The Court's Precedents And The Evidentiary Record

The Special Master defined the debtor as the issuer rather than the record holder on grounds of fairness. Report at 35-36. Here, however, the Master conceded that the Court's formulation of the *Texas* backup rule was not predicated on concepts of fairness. *See* Report at 17. Rather, the Court was interested solely in a rule of certainty and convenience to accommodate those situations that proved the exception to the primary rule. *Texas v. New Jersey*, 379 U.S. at 682; *see* Report at 17. In *Pennsylvania v. New York*, the Court expressly rejected the argument that the backup rule should not be applied because the result would be unfair. 407 U.S. at 212-213.

Since fairness is not a concern under the *Texas* backup rule, the Special Master's adoption of a fairness test to define the debtor under the rule was erroneous. In addition, since the Court never addressed the question of fairness in that context, it never articulated a standard of fairness. Accordingly, the Special Master was relegated to creating a standard of his own.

---

[54] The Special Master's error in relying on the Happersett Affidavit is evidenced, for example, in his conclusion that because record holders presently report unclaimed distributions to the various states according to an available last known address of a beneficial owner, they could just as easily report it to the issuers' jurisdictions. Report at 40, n.36. This conclusion assumes that the property owed to known creditors is comparable in volume and frequency of escheat to property owed to unknowns. There is, of course, nothing in the record to support such a conclusion. To the contrary, the instances in which a known recipient cannot be paid are usually limited to situations in which the recipient has moved without leaving a forwarding address or has died without leaving instructions concerning the checks. *See, e.g.*, Wellener Dep. at 119, 123.

> A more durable consideration is the notion of rewarding the jurisdiction that has a claim to benefitting the "company whose business activities made the intangible property come into existence," *Pennsylvania v. New York*, 379 U.S., at 680.[55]

Report at 35.

Even assuming that it were permissible to use fairness to determine a specific application of the *Texas* backup rule, the Special Master's analysis in this regard is unpersuasive. It is more reasonable to conclude that fairness is served by permitting the record holders' jurisdictions to escheat the property in question.

The Special Master selected the issuer-debtor theory because it would give the property to the jurisdictions that gave the benefits of their laws and economy to the companies whose business activities generated the property. Report at 35. With regard to the record holders' jurisdictions, the Special Master concluded that permitting them to take the funds would "reward the state of incorporation of an intermediary whose records (or lack thereof) created the problem that resulted in the escheatable property in the first instance." *Id.* at 36.

The essential error in the Special Master's reasoning lies in his perception of the causes of abandoned property. The Master would treat "the myriad details of securities transactions" as "one paradigmatic factual pattern" in which payments become abandoned whenever they "get stuck" in the hands of record holders. Report at 9-11; *see also id.* at Appendix B. As the discussion of the evidentiary record demonstrates (*see* pp. 17-22, *ante*), this attempt at simplification results in a critical distortion of the dynamics involved in the creation of escheatable property in this

---

[55] The quotation is from *Texas v. New Jersey*, to which the citation refers. It is ironic that the Special Master hinged his fairness standard under the *Texas* backup rule to the Court's discussion in *Texas v. New Jersey* of the relative merits of locating a debtor by its domicile or place of principal office. When the Court announced the backup rule, it selected domicile over principal place of business, thereby rejecting the concept of fairness proposed by the Special Master for identifying debtors under the backup rule.

case. In fact, the problem of abandoned securities distributions results from the persistence of securities issues in certificated format, which results in Cede float and nominee float. *Issuers*, not record holders, are responsible for the format of a security's issuance. The securities industry, operating through the depository system that was born out of the crisis generated by certificated issues, has made significant strides in reducing unclaimed distributions to a tiny fraction of total distributions. *See* Report at 10, n.9, referring to estimates of 0.02% of total distributions. This is remarkable, indeed, considering the fact that hundreds of millions of securities are traded every day. Record holders are also in the vanguard of efforts to eliminate the abandoned property in question by providing the technology and services needed for the complete conversion to certificateless issues.

In addition, contrary to the Special Master's persistent references to the record holders as "intermediaries" in the "securities distribution system" and "transparencies" (*see, e.g.*, Report at 36), their record ownership has a legal and practical significance that is at the very heart of the securities industry. Brokers, banks and depositories perform a multitude of functions all of which are essential to the continued viability of corporate investment. Their role cannot be ignored in any consideration of fairness. Issuers, by contrast, cease to have any connection with securities payments after they pay the record holders. Indeed, they have no contact with, or knowledge of, the beneficial owners of the securities unless the owners request such contact as non-objecting beneficial owners ("NOBOs"). On equitable grounds, therefore, the escheat claims of jurisdictions that provide the benefits of their economy and laws to the entities that make the payment of distributions possible, the record holders, cannot be sublimated to the claims of the issuers' jurisdictions.

E. The Special Master's Ultimate Rejection Of State Law Is Based Upon The Impermissible Ground That It Does Not Result In A Dispersal Of The Funds To All The States

The Special Master's only other objection to resolving the claims in this case according to established state law debtor-creditor relationships is that state law relieves the issuer of its

payment obligation by paying the record holder, but the record holder does not, thereby, obtain the property as an asset. Report at 26. Rather, the record holder, unless it is also a beneficial owner, is obligated to pay the distribution to another person or entity. *Id.*[56] The Master concluded that state law thus "results in incongruous identification as debtors and creditors of entities who may have no ownership claims in the property at issue." *Id.* at 38.

The Special Master could not, however, assert that this state law effect interfered with the operation of the *Texas* rules. He could only conclude that the debtor-creditor relationships delineated by state law were of "no consequence" to the Court's escheat rules. Report at 30, n.28. This conclusion is not only incorrect, since identifying the obligor and obligee are the essence of the Court's escheat jurisprudence, it is not a justifiable rationale for rejecting state law. It therefore suggests that the Special Master was searching for alternative debtor-creditor definitions to facilitate the flow of unclaimed distributions from New York's record holders to other jurisdictions.

The Special Master's first reference to this goal occurred during his imposition of a fairness standard under the *Texas* backup rule. Report at 35. He indicated there that his adoption of the issuer-debtor theory on fairness grounds was "not principally" because it "would necessarily distribute the funds more 'evenly' among the states". *Id.*, and n.32. In fact, because the issuer-debtor theory proffered by Texas, *et al.* and Alabama, *et al.* looked to the issuer's domicile, its adoption in that form would not have resulted in a full dispersal of the funds because of the large number of issuers domiciled in Delaware. It was, therefore, necessary for the Special Master to recommend a change in the locator under the *Texas* backup rule, from domicile to chief executive office, in order for the issuer-debtor theory to produce the sought after allocation.

---

[56] It is also apparent, however, that if the record holder is unable to pay the distribution, the issuer is not entitled to a return of the underlying asset. The right to retain the property and derive income from it is appurtenant to the record holder's right to the property under state law after the issuer's debt is discharged.

> However, the Texas, Alabama, et al., position also addresses distributional concerns without adding a further fiction to the concept of the beneficial owner's location. Particularly if the backup rule is construed to define the issuer's location for escheat purposes to be where its principal executive offices are, rather than where it is incorporated, that backup rule may have as much underlying fairness as the approach proposed by California, et al.

Report at 52.

New York does not take exception to the Special Master's analysis supporting a change in the locator under the *Texas* backup rule from domicile to chief executive office. *See* Report at 40-50. Rather, the salient point is that the Master has proposed this change, in conjunction with a new federal common law definition of the issuer as the debtor of the property in question, to redistribute the property among the States.[37] This usage is contrary to the Court's precedents. *See Pennsylvania v. New York*, 407 U.S. at 214-215.

The result sought by the Special Master also raises the very concerns which he deemed relevant in rejecting the commercial activities test advocated by California, *et al.* Report at 53-55. Both the revised issuer-debtor theory and the commercial activities test change the *Texas v. New Jersey* escheat rules, thereby implicating the doctrine of *stare decisis*. *See* Report at 53. In addition, whereas the commercial activities test lacks an allocation formula, the revised issuer-debtor theory also depends upon untested allocation mechanisms that will require record holders to report the property to 51 jurisdictions. There is no credible

---

[37] As the Special Master recognized, however, in the case of federal issuers, "use of either a jurisdiction of incorporation test or a principal executive office test seems strained." Report at 49, n.45. Accordingly, he presumed that the District of Columbia would take the funds as the locational surrogate for the federal government. *Id.* This would, of course, produce a windfall for that jurisdiction since a high percentage of the unclaimed distributions in question is attributable to federal issues.

basis for the Court to determine whether the allocation is workable or the extent of the disruption that it will entail for the securities industry. At least one of the problems isolated by the Master in allocating the funds under the commercial activities test - maintaining compliance with diverse state escheat laws - applies as well to the allocation under the issuer-debtor theory. *Compare* Report at 54-55 with the Securities Industry Association LaRocca Affidavit discussed at pp. 67-68, *ante*. As the Special Master appropriately noted:

> Congress has the ability, should it be unsatisfied with the application of the Supreme Court's basic rules in this area to a particular type of transaction to change the rule with respect to that kind of transaction.

Report at 54. Although expressed in the context of the California, *et al.* theory, this statement is equally pertinent to the Special Master's adoption of the Texas, *et al.* and Alabama, *et al.* issuer-debtor theory.

POINT II

THE CREDITOR OF THE PROPERTY IN QUESTION UNDER THE *TEXAS V. NEW JERSEY* PRIMARY RULE IS THE OWNER IDENTIFIED BY THE DEBTOR'S BOOKS

The Special Master incorrectly concluded that the Court's precedents require treating the "ultimate intended beneficiary" as the creditor of abandoned intangible property. *See* Report at 64. To the contrary, the Court's focus under the *Texas* primary rule is on the person or entity identified *by the debtor's books and records* with apparent ownership rights in the property. Accordingly, New York's claim under the primary rule predicated upon the rights of creditor brokers and banks should not have been rejected. In any event, the evidentiary record established that the creditor brokers and banks routinely pay the distributions to their customers, the beneficial owners, and thereby obtain beneficial ownership interests in the property. Finally, New York should have been given the opportunity to demonstrate that

the addresses of the creditor brokers and banks can be ascertained from the debtor brokers' books and records.

A. The Court Did Not Make Escheat Under The *Texas v. New Jersey* Primary Rule Contingent Upon Identifying The Ultimate Intended Beneficial Owners Of The Property

In *Texas v. New Jersey* the Court did not alter the understanding evident from its prior escheat decisions that intangible property, such as a debt, constitutes the payment obligation between the debtor and creditor.

> With respect to tangible property, real or personal, it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat. But intangible property, *such as a debt which a person is entitled to collect*, is not physical matter which can be located on a map.

Texas v. New Jersey, 379 U.S. at 677 (emphasis added). The Court was concerned only with the fairness of treating the payment obligation as the creditor's property for purposes of a rule that would give a jurisdiction the preeminent right of escheat.

> On the other hand, these debts owed by Sun are not property to it, but rather a liability, and it would be strange to convert a liability into an asset when the State decides to escheat.

Texas v. New Jersey, 379 U.S. at 680.

Accordingly, in announcing the primary rule, the Court simply adopted the position that because the payment obligation is the creditor's property, its jurisdiction, as determined from the debtor's records, should escheat in the first instance. *Id.* at 680-681. This reflected the conclusion of the Special Master in that case.

> The obligation to pay is the creditor's property in the intangible. Seizing that obligation by the state is the equivalent of vesting title of the property in the state.

Report of the Special Master, *Texas v. New Jersey*, at 35.

The Court, therefore, did not look beyond the debtor-creditor relationship established by the debtor's records in determining the jurisdiction with the right to escheat intangible property under the *Texas* primary rule. Indeed, to require, as the Special Master has, that a claiming jurisdiction demonstrate that it stands in the shoes of an "ultimate" owner would hobble the primary rule to the point of inefficacy by making its application dependent upon the facts of each case. As previously pointed out, the broker's customer may not even be the ultimate beneficial owner but may be acting for someone else. *See* p. 5, *ante*. There is no standard format for ownership and the attributes of beneficial ownership may be divided among more than one person or entity. *Id.* The factual approach inherent in an ultimate intended beneficial owner test is one which the Court intended to avoid under its escheat rules. *Texas v. New Jersey*, 379 U.S. at 679; *Pennsylvania v. New York*, 407 U.S. at 215.

Thus, in *Pennsylvania v. New York*, the Court addressed both the sender and the payee of a Western Union money order as creditors. It did so because it agreed with the Special Master in that case that Western Union owed the money, as a "common debt" obligation, either to the payee or back to the sender. 407 U.S. at 213; Report of the Special Master at 15. Therefore, the Court recognized these parties as creditors under the *Texas* primary rule because either had the right to claim the funds from Western Union.

Had the Court been concerned with ultimate ownership interests, as the Special Master here has concluded, the Court could not have designated *two* creditors of the same property. And if the payee was the most logical candidate for creditor, the Court would still have had to determine whether the sender intended the payee to keep the money or pay it to someone else. These concerns were clearly irrelevant and must be interpreted to mean that the Court did not intend "ultimate" ownership interests to determine the application of the *Texas* primary rule.

Similarly, in *Texas v. New Jersey*, the Court identified Sun's creditors as the unpaid distributees of its stock because they alone

had the ostensible right to enforce the payment obligation under the debt. The Court was not concerned with parties outside of the debtor-creditor relationship. Although the Special Master cited the Court's inattention to Sun's "banks, transfer agents and payment intermediaries" as support for his "ultimate owner" theory (*see* Report at 64), this is untenable. As agents of Sun, these entities simply had no ownership interests in the property whatsoever.

The conclusion, therefore, that the creditor of abandoned intangible property under the *Texas* primary rule is the obligee under the debt is the logical interpretation of the Court's precedents. It reflects the fact that the Court's definition of intangible property as an "asset" refers to the right to the payment obligation, not the security or other property from which it is derived. Moreover, the Court's reliance on the debtor's books and records to identify the creditor's jurisdiction encapsulates the debtor-creditor relationship established there for purposes of applying the primary rule. Finally, any attempt to look beyond that relationship would necessarily generate the very type of factual inquiry that the Court strenuously sought to avoid.

B. Creditor Brokers And Banks On the Debtor Brokers' Records Are The Creditors Under The *Texas* v. *New Jersey* Primary Rule

Under the *Texas* primary rule, the right to escheat must be accorded to the jurisdiction "of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-681. The evidence taken from three brokerage firms established that their unclaimed distributions are owed to other brokers and banks. This corresponds to the fact that the cause of their abandoned property is nominee float, which arises when brokers and banks buy and sell securities in certificated format and are unable to timely re-register the certificates. *See* pp. 29-34, *ante*. The debtors (or selling brokers) owe the funds to the creditors (or purchasing brokers and banks). *Id*. Only these creditors are entitled to enforce the payment obligation under the debt by claiming the distributions from the debtor brokers. *Id*. The focal

point of the primary rule is the debtor-creditor relationship *established by the debtor's books.*

The Special Master's refusal to apply the primary rule to the creditor broker or bank on the debtor broker's records also generates fundamental inconsistencies that cannot be reconciled with the Court's precedents. First, by defining the creditor as the "ultimate intended beneficial owner," the Special Master *precluded* application of the primary rule to virtually all of the unclaimed distributions held by debtor brokers. These entities have no way of knowing the identity of parties that are not recorded as creditors on their books. In particular, "ultimate intended beneficial owners" refers to the customers of the creditor brokers, parties which the debtor brokers do not have knowledge of. Nor could a debtor broker distinguish between brokers and banks that were trading for their own accounts and those that were not. Therefore, the Master's rejection of identifiable creditors in favor of ultimate intended owners simply interprets the primary rule in such a way that it cannot be utilized. This clearly conflicts with the Court's intention of giving the right of escheat to the creditor's jurisdiction. In *Pennsylvania v. New York*, by contrast, the Court permitted the funds to flow under the *Texas* backup rule as a matter of last resort because of Western Union's business practice of not recording the senders and payees of its money orders. The Court viewed its adherence to the last known address provision of the primary rule as a reaffirmation of the rule. In this case, the Special Master's invitation to reconstruct the debtor brokers' records to identify an "ultimate intended beneficial owner" simply obscures the fact that his definition of the creditor prevents the application of the primary rule to the property in question in the first place.

Second, if the Special Master were correct in his conclusion that the primary rule looks to beneficial ownership rights in the property, then he was unjustified in ignoring the rights of

creditor brokers and banks.[55] *See* Report at 65. The property in this case is not the underlying security. Rather, it is the distribution generated by the security. Where, as here, the creditor broker has paid the owner of the security, the creditor broker *owns* the right to the distribution and is, therefore, the creditor. It thus becomes apparent that the Special Master's definition of the creditor as the "ultimate intended beneficial owner" is merely a formalism. *See, e.g.*, Report at 64-65. It simply assigns a creditor counterpart to the issuer under the issuer-debtor theory without regard to the wording and intent of the *Texas* primary rule. For these reasons, the Special Master's result should be rejected.

C. New York Has Raised A Question Of Fact Concerning The Identification Of The Creditors

The Special Master interpreted New York's position "as essentially asking for the adoption of a legal standard for presuming addresses that are in fact unknown." Report at 59, n.50. He concluded that such a position was inconsistent with *Pennsylvania v. New York*, where the Court refused to presume "that the state in which the money orders were purchased was the state of the sender's domicile." *Id.* The Special Master has, thereby, demonstrated a misunderstanding of New York's claim under the *Texas* primary rule.

In this case, unlike *Pennsylvania v. New York*, the creditors' addresses are actually present on the debtors' records. Accordingly, New York is not relying on a legal presumption to locate

---

[55] The Special Master's belief that the payments made by creditor brokers and banks to their customers do not correspond to the abandoned property held by debtor brokers is simply the result of a misapprehension over the cause of the abandoned property. *Compare* Report at 62, n.54 and 66, n.57, with discussion at pp. 17-22, *ante*. Indeed, as to the abandoned property received by New York for the years 1985 through 1989, 97.4% of the claims paid by New York were to brokers and financial institutions including banks and DTC. *See* Responses of the State of New York to the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, Answers to Interrogatories 5(e) and 25. Since these entities testified that they routinely pay their customers the distributions to which the customers are entitled, it necessarily follows that the funds are owed to these brokers and banks as their assets.

creditors whose addresses have not been recorded.[59] New York has demonstrated that the debtor brokers' transactions can be reconstructed, and that the trades that resulted in unclaimed distributions can be traced to the creditor brokers that purchased the underlying securities and were underpaid the distributions. *See* Robert Griffin Affidavit (May 5, 1988). However, the amount of time and resources that would be required to reconstruct the overpayment transactions would be very considerable. *Id.* Therefore, New York has suggested the use of statistical sampling to prove that virtually all of the creditor brokers and banks recorded on the books of debtor brokers in New York have New York addresses. *Id.*

The Special Master erroneously stated in this regard that "[t]here is nothing in the Court's jurisprudence to suggest that New York can prevail by making a statistical showing that 'most' such addresses are in New York." Report at 67. To the contrary, the Court's escheat rules are founded upon an express preference for escheat of intangible property by the State of the creditor's jurisdiction. Only when the debtor's books do not record any creditor (or the creditor's jurisdiction does not provide for the escheat of the property), has the Court permitted the property to escheat to the debtor's jurisdiction. Since the purpose for using a statistical sampling here is to implement the priorities established by the Court in its escheat rules, it is both consistent with precedent and logical to do so.

---

[59] The Special Master also suggested that the merit of New York's position was doubtful because New York was relying upon the creditor brokers' "trading addresses," a concept which the Special Master questioned. Report at 67, n.59. To the contrary, the trading address is neither a term devised by New York for purposes of this litigation nor one of imprecise meaning. The creditor broker's trading address is the place where it receives delivery of physical certificates and maintains its accounts of those transactions. It is the same address that the debtor broker relies upon to arrange for the delivery of the certificates and which it enters into its records. The trading address, in turn, is the official address used by the National Securities Clearing Corporation ("NSCC"), which is the service that delivers physical certificates between brokers and banks in New York. Most of the creditor brokers who remit property to New York are NSCC participants and most, if not all, of them have New York trading addresses.

Moreover, the fact that the Court has not previously considered the use of statistical proof in this context is not grounds for rejecting it. *See* Report at 67. The Special Master has, for example, proposed that the Court adopt a chief executive office locational test under the *Texas* backup rule even though the Court rejected it when it decided *Texas v. New Jersey* as being too uncertain. The Special Master asserted that, "I do not believe that this concern is warranted today . . . however justified it was in 1965." Report at 42. Similarly, although the Court has not had occasion to pass upon the use of statistical evidence in its prior escheat decisions, it has repeatedly approved the use of statistical proof in various types of cases, most notably to establish racial discrimination in employment discrimination suits, *see, e.g., Hazelwood School District v. United States*, 433 U.S. 299 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), and jury selection cases, *see, e.g., Turner v. Fouche*, 396 U.S. 346 (1970); *Hernandez v. Texas*, 347 U.S. 475 (1954).

Finally, the Special Master also erred when he concluded that the discovery taken from industry entities and personnel established that the creditors of unclaimed distributions are always unknown. Report at 61. This conclusion is warranted only for the property held by DTC and custodian banks. With regard to debtor brokers, the evidentiary record revealed that they do not make any effort to locate the owners of their unclaimed property. Rather, they wait for the creditor broker to come forward with a claim, and only then will they research the claim to authenticate it. In the case of brokers, therefore, the fact that they do not know the identity of their creditors at the time they report the property as abandoned proves no more than that. It does not dispute that the creditors' identities are ascertainable from the debtor brokers' records if the proper inquiry is undertaken. *See* pp. 32-34, *ante*.

New York should, therefore, be permitted to pursue discovery, beyond that allowed by the Special Master, to demonstrate that it is the State of last known address of virtually all of the creditor brokers on the books and records of New York debtor brokers.

POINT III

THE REPORT OF THE SPECIAL MASTER, IF ADOPTED, SHOULD BE PROSPECTIVELY IMPLEMENTED

When the Court, in *Pennsylvania v. New York*, applied *Texas v. New Jersey* to Western Union money orders purchased seven years before the *Texas* decision (407 U.S. at 212), it did not thereby address the question of retroactivity. Rather, it applied the core principle of its escheat jurisprudence, that a State lacks the jurisdiction to unilaterally cut off the rights of other States asserting superior claims to the property. *Texas v. New Jersey*, 379 U.S. at 682. Accordingly, New York's escheats of Western Union's abandoned money order proceeds as the debtor's domicile were voidable, subject to the rights of States claiming the property as the creditor's jurisdiction. The Court did not apply *Chevron Oil v. Huson*, 404 U.S. 97 (1971), which it decided a year before *Pennsylvania v. New York*, because retroactivity was not the issue there. The Special Master thus missed the point when he asserted that

> The retroactivity of the Court's decision interpreting and applying escheat rules was at issue in *Pennsylvania v. New York*, where the Court adopted, over the express contention of New York that *Texas v. New Jersey* should not be applied retroactively, the Special Master's recommendation that "the *Texas* rule be applied to all items involved in this case regardless of the date of the transactions out of which they arose."

Report at 71 (citing 407 U.S. at 212-213). In the present case, by contrast, retroactivity is involved because the Special Master has recommended changes in the escheat rules themselves, thereby unsettling the expectations of New York (as well as all other jurisdictions) in escheating this property in reliance upon the existing rules.

A. The Retroactivity Issue Should Be Determined With Regard To The Court's Original Rule-Making Jurisdiction

The Special Master has clearly recommended changes in the Court's escheat rules regardless of how significant he perceived those changes to be. The Court's use of the term "debtor" under the *Texas* backup rule would become a reference to debtor attributes, and the attribute that would be controlling is the last "claim to the funds as an asset that would appropriately be reflected in the net worth of the entity in question." Report at 32. Similarly, the term "creditor" under the *Texas* primary rule would be defined according to the attributes test, and the meaning ascribed to that term would be the right to the property as the ultimate intended beneficiary. *Id.* at 31. Finally, under the Special Master's formulation, a new entitlement provision would permit the jurisdictions of record owners to escheat the property in question whenever the beneficial owners and issuers are unknown. Report at A-3 to A-4.

Since the Special Master has recommended that the Court revise the rules it has created, it follows that the changes be announced prospectively. The Court is not revisiting statutory or constitutional precedents thereby invoking seminal questions of retroactivity under its judicial decision-making authority. This case, as viewed by the Special Master, simply requires the Court to elaborate on its own escheat rules. Fairness and logic would dictate that this be done prospectively. *Compare with James B. Beam Distilling Co. v. Georgia*, ____ U.S. ____, 111 S. Ct. 2439 (1991), and *American Trucking Associations, Inc. v. Smith*, 496 U.S. 167 (1990) (discussing the Court's concerns over prospective application of its decisions interpreting constitutional and statutory provisions).

B. The *Chevron Oil* Test

If the Court were to apply a retroactivity analysis, the Special Master correctly recognized that *Chevron Oil* sets forth the generally applicable standard. Report at 72; *see Beam* at 111 S. Ct. at 2447 ("our decision here does not limit the possible

applications of the *Chevron Oil* analysis"); *American Trucking* at 496 U.S. at 178 ("retroactivity of decisions in the civil context 'continues to be governed by the standard announced in [*Chevron Oil*]' " (citing *Griffith v. Kentucky*, 479 U.S. at 322, n.8.). The three steps of the *Chevron Oil* analysis are the following:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity."

404 U.S. at 106-107 (citations omitted). Applied here, these factors support New York's request for prospectivity.

1. New Principles Of Law

The recommendations of the Special Master are contrary to the Court's escheat precedents. The Court has consistently defined the debtor as the obligor, not as a party that has discharged its debt but had the last claim to the underlying property as an asset. The Court has also required that the creditor of unclaimed property be determined from the debtor's books and records. It has thus identified the creditor by its right to demand payment of the debt. The Court has never imposed an "ultimate beneficial ownership interest" test for identifying the creditor.

These clear understandings of the meaning of debtor and creditor in the Court's decisions were incorporated into the

uniform abandoned property acts and the States' own abandoned property statutes, which were modeled on the uniform acts. Accordingly the States, applying the uniform commercial law principle that the issuer's debt is discharged upon payment of a distribution to the record holder (U.C.C. § 8-207(1)), have uniformly treated the record holder as the debtor. The States have also looked to the record holder's books for an apparent owner when identifying the creditor, not for a beneficial owner. The Special Master's Report changes the Court's precedents, established commercial law principles and state escheat law. Therefore, the Report can only be viewed as establishing new legal principles which were not clearly foreshadowed.

Although the Special Master asserted that he was merely interpreting and applying *Texas v. New Jersey*, that is not so. He has dramatically altered the Court's escheat rules based upon his novel debtor-creditor definitions. In the application of the backup rule the Report concluded that "the State of domicile of the originator may take custody of the unclaimed distributions, whether or not the originator would have been entitled to receive the funds back in its own right." It is the novelty of this concept, *i.e.*, applying the term "debtor" to an entity that has discharged its debt, that demonstrates the emergence of new legal principles. The result is no less novel in the context of the *Texas* primary rule, which focuses on the debtor-creditor relationship on the debtor's books and records. The Special Master's requirement that the primary rule search beyond the debtor's records for a party "intended" to have "ultimate" ownership rights in the property is facially inconsistent with the rule and therefore unforeseeable.

Not only have the concepts of the debtor and creditor changed fundamentally, the dynamics of the Court's escheat rules have also been transformed. In the context of the *Texas* backup rule, the Report defines the debtor not by the underlying payment obligation that the Court has consistently relied upon in its escheat decisions, but rather by notions of fairness. The Court, however, never considered fairness when formulating the backup rule, nor did it ever use "fairness" in the same sense that the Special Master has, *i.e.*, rewarding jurisdictions of companies

whose business activities made the intangible property come into existence. Finally, the Report suggests that the Special Master was concerned with using the Court's escheat rules to allocate the property more equitably among the States. In *Pennsylvania v. New York*, the Court rejected such a rationale as a basis for departing from the literal application of its escheat precedents.

With regard to the *Texas* primary rule, the Special Master negated its relevance to the property in question simply by identifying "creditors" that *cannot* be identified from the record holders' books. This stands in direct conflict with the Court's intention that abandoned intangible property escheat to the creditor's jurisdiction whenever possible. Moreover, even if beneficial ownership interests in the underlying asset were required to identify a creditor under the Court's precedents, it would be impossible to predict that the identical ownership interests in the hands of creditor brokers would be disregarded because they were not the "ultimate intended" owners.

Accordingly, the Court's precedents do not foreshadow the Report's conclusions. The idea that the debtor-creditor rules were laid down as shorthand for an originator and ultimate intended beneficiary of the escheatable property is directly contrary to the Court's escheat jurisprudence. This conclusion is all the more compelling since these entities do not possess the attributes of debtors and creditors as those terms are commonly understood. Finally, even if the Special Master's reliance on "fairness" was appropriate, his conclusion that the property should not escheat to the jurisdictions most closely associated with the record holders is untenable. The conclusion is thus warranted that New York has satisfied the first prong of the *Chevron Oil* analysis in favor of nonretroactivity.

2. The Merits Of Prospective Operation

The conclusion that a new principle of law has been announced does not end the inquiry. *American Trucking*, 496 U.S. at 180 (citing *Florida v. Long*, 487 U.S. 223, 230 (1988)); *American Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1109-1110 (1983)

(concurring opinion). In conformity with the second prong of the *Chevron Oil* test, the Court seeks to determine whether the purpose of the law at issue dictates retroactive, rather than prospective, operation. The Court has favored nonretroactivity when the purpose of the law is fully served by preventing the proscribed activity as of the date of the decision, and retroactivity would serve no deterrent effect. *American Trucking*, 496 U.S. at 180-181.

Turning to the purpose of the Court's rule-making in this area, *Texas v. New Jersey* clearly expresses the goal of fashioning a rule of priority whereby the States can resolve their disputes over the escheat of intangible property fairly and expeditiously. The Court's quest for uniform rules is compelling support for the nonretroactive application of new principles that affect substantially the rules' impact. This is particularly relevant where, as here, the various States' abandoned property laws provide coverage for the property at issue based upon the same understanding of *Texas v. New Jersey* as that held by New York. *See* pp. 56-60, *ante*.

Debtor brokers throughout the country report their unclaimed distributions to the State in which they conduct their securities trades. This is in recognition of that State's priority under the *Texas v. New Jersey* primary rule as the State of last known address of the creditor broker (or apparent owner). The three securities depositories, holding funds owed to unknown creditors, report their abandoned property to their respective domiciles under the *Texas* backup rule. Custodian banks track the reporting practices of the depositories. These practices must change if the Court adopts the Special Master's recommendation that unclaimed distributions be reported to the issuer's domicile (or chief executive office) whenever the ultimate beneficial owner is unknown. No State, moreover, presently has coverage for the property in question based on the issuer's chief executive office. Both fairness and the concern for ease of administration dictate that new rules of priority altering the escheat activities of all the States commence at the same time.

Other concerns as well are obviated by doing so in this case. For example, since the States have, pursuant to the authority

of their own abandoned property laws, also taken custody of the type of property at issue from record holders incompatibly with the Report's recommendations, applying the new principles of law prospectively leaves their acquisitions in repose. *See Beam*, 111 S. Ct. at 2448 ("[W]hen the Court has applied a rule of law to the litigants in the case it must do so with respect to all others not barred by procedural requirements or res judicata."). If the Special Master's recommendations are given retroactive effect, then New York will pursue its right to collect the funds escheated by the States under existing escheat principles. In addition, in the absence of a solution to the problem of designating a domicile or chief executive office for foreign issuers, remitting the funds previously collected on their issues becomes impractical.

Second, the proposed new debtor-creditor rules will apply as well to unclaimed property in the hands of issuers and their paying agents, which these entities have been reporting to the issuer's domicile (as debts of the issuer) if the creditors are unknown or are in States without coverage for the property. This property includes abandoned securities distributions as well as other types of debts such as unpaid wages and vendor payments. If the Court were to adopt the proposed changes in the *Texas* rules, all of this property must be reported to the State of the issuer's chief executive office. Retroactive application of the new rules, moreover, will also unsettle the prior escheat of these funds and subject the domiciliary States to claims by the States of the issuers' chief executive offices.[40] The proposed changes in the escheat rules should, therefore, be chartered prospectively, leaving past actions undisturbed.

The remaining concern for deterrence, subsumed under the second prong of the *Chevron Oil* analysis, is of no moment here. New York's application of uniform state law debtor-creditor

---

[40] The Special Master concluded that his proposed change in the locator under the *Texas* backup rule from domicile to chief executive office did not implicate reliance interests protected by *Chevron Oil*. Report at 73.

definitions to the property in question is consistent with the Court's precedents, the uniform unclaimed property acts and prevailing escheat laws throughout the country. Consequently, the Court's reason for rejecting a deterrence argument applies here as well (the imposition of liability in hindsight against a state that, acting reasonably would do the same thing again, will serve no deterrent effect). *See Beam*, 111 S. Ct. at 2544 (dissenting opinion of O'Connor, J., citing *American Trucking*, 110 S. Ct. 2323).

For these reasons, the second prong of the *Chevron Oil* analysis also favors nonretroactivity.

3. Weighing The Equities

Finally, in determining whether a decision should be applied retroactively, the *Chevron Oil* test requires consideration of the reliance interests of all parties affected by changes in the law. "Where a State can easily foresee the invalidation of its [actions], its reliance interests may merit little concern." *American Trucking*, 496 U.S. at 182 (citing *McKesson Corp. v. Florida Alcohol & Tobacco Div.*, 496 U.S. at 44-46, 50). "By contrast, because the State cannot be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking*, at 182. *See also Beam*, 111 S. Ct. at 2444. Thus, the equitable analysis of *Chevron Oil* places limitations on the liability that may be imposed upon a party after the Court changes the law.

As New York has demonstrated, its escheat of the property in question was done in conformity with the *Texas v. New Jersey* escheat rules. The genuineness of New York's reliance upon precedent in its application of the primary and backup rules is fully corroborated by the equivalent reliance of the other States expressed in their own escheat practices. In addition, prior to this action, no State questioned these practices either administratively or judicially. Other cases in which the Court has considered the reliance factor establish that a party is entitled

to rely on existing law unless it is plainly invalid or there has been bad faith. None of these circumstances is present here. *See American Trucking*, 496 U.S. at 180 (it is proper to rely upon precedent of the Court even though it appears to rest on decisions rejected in some other line of decisions); *Lemon v. Kurtzman*, 411 U.S. 192, 207 (1973) (*Lemon II*) (although it was clear that there would be a constitutional challenge to a state statute, it could not be said that appellees acted in bad faith or that they relied on a plainly unlawful statute). *See also Goodman v. Lukens Steel Co.*, 482 U.S. 656, 662-663 (1987) (reliance is absent where the precedent that was overruled was not in effect at the time that the petitioner's actions were taken).

It is precisely because the States interpreted the Court's precedents in the same way, and relied upon that understanding in determining the funds to which they were entitled under the *Texas* escheat rules, that they are not harmed by the nonretroactive application of the proposed new escheat principles. The States did not anticipate receiving more of the funds and made their budgetary decisions accordingly. *See Beam*, 111 S. Ct. at 2455 (dissent of O'Connor, J.) ("there is little hardship to these companies from not receiving a tax refund they had no reason to anticipate."). Moreover, all escheated funds may be viewed as a windfall when compared to tax revenues.

By contrast, retroactivity will subject New York to devastating financial liability since the bulk of the money must be paid out of the State Treasury. Pursuant to New York State Finance Law § 95 (55 McKinney's Cons. Laws of N.Y. 1989), monies in the abandoned property fund in excess of $750,000 are paid into the State Treasury to the credit of the general fund. The Court recently concluded that repayment of a $30 million tax refund, a far smaller sum than the hundreds of million of dollars potentially involved here, would result in extreme and undue hardship to a State and its citizens in the form of higher taxes and reduced benefits. *American Trucking*, 496 U.S. at 182.

Although the Special Master admitted to "being troubled" by the enormous fiscal implications of retroactivity in this case,

he speculated that there may be practical limitations on New York's exposure for funds allocated in the 1970s or earlier. Report at 76-77. Even if this proved to be true, it is of little consequence. New York's liability for items collected between 1985 and 1991 alone amounts to approximately $631 million. The Special Master's assertion that New York took a "calculated risk" when it collected the funds and should, therefore, incur the consequences of disgorgement is spurious. Report at 76, n.68. New York has always maintained sufficient reserves to pay claimants, whether creditors or jurisdictions asserting a superior claim under the primary rule. In effect, the Special Master would also require States to anticipate retroactive changes in the underlying escheat rules and budget for the repayment of most of the funds they had escheated. It is unlikely that any jurisdiction would undertake the responsibilities of escheat in the first instance if they were exposed to the possibility of such a huge aggregate liability. It is also ironic that the Special Master would penalize New York for using the escheated funds and yet take the position that escheat is a means of rewarding jurisdictions under the backup rule. *See* Report at 35.

Finally, when considering the equities, the Court has also taken account of "the attendant potentially significant administrative costs" that retroactivity would entail. *American Trucking*, 496 U.S. at 183. In this case, New York will be required to determine the domicile (or chief executive office) of each issuer on whose securities New York received abandoned property and remit the proceeds accordingly. Since issuers change their locations, the process would have to be repeated for every distribution period. This, coupled with the great many issuers involved, would require an extraordinary expenditure of resources and personnel at a time when the State is already undergoing extreme financial difficulties. The Court has repeatedly expressed its great reluctance to engage in retroactive decision-making which threatens to disrupt governmental operations.

> To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the

> government's constituents. These concerns have long informed the Court's retroactivity decisions.

American Trucking, 496 U.S. at 185 (citations omitted).

In the event that the Court were to give full retroactive effect to the Report of the Special Master, New York requests that consideration be given to remedial limitations based upon a statute of limitations or the equitable doctrine of laches. New York sought such relief in its pleadings. *See, e.g.*, New York's Answer to the Amended Complaint of the State of Texas, dated November 17, 1989, at 22. Contrary to the Special Master's analysis of these defenses, the Court has not previously rejected them in the context of its escheat rulings. *See* Report at 74-75.

The essential difference between this case and the Court's prior decisions is that the States here do not assert a superior claim to the property escheated by New York under the *Texas* primary rule. Rather, they are claiming a right to the property pursuant to changes in the backup rule. The Court's previous refusals to place any limitation on the advancement of claims by the creditors' jurisdictions is simply not involved here. In addition, the States maintain that their claims are merely logical applications of the Court's rules. If that is the case, then the conclusion is warranted that the States slept on their rights until it was financially worthwhile for them to come forward. This is precisely the conduct that invokes the bar of laches.

This case, therefore, raises critical concerns over the administration of the Court's escheat rules. Unless States are insulated from the type of "disgorgement" contemplated by the Special Master, they will be subject to financial consequences of potentially devastating proportion simply because they applied the rules according to their best understanding of them to date.

CONCLUSION

For all of the foregoing reasons, New York respectfully urges that the Court reject the Report of the Special Master adopting the legal theory of Texas, *et al.* and Alabama, *et al.* The complaints of the plaintiff-intervenor States should be dismissed as setting forth legal theories inconsistent with *Texas v. New Jersey* and *Pennsylvania v. New York*. The matter should be remanded to the Special Master for further proceedings concerning the issues raised by New York in response to Delaware's claims under the *Texas* primary rule. Alternatively, if the Court adopts the Special Master's Report, the new escheat principles should be prospectively applied or their retroactive application be subject to remedial constraints.

Dated: New York, New York
May 26, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

(40)

No. 111 Original

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STATE OF DELAWARE

Plaintiff,

v.

STATE OF NEW YORK

Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED JANUARY 28, 1992

EXCEPTIONS OF THE STATES OF MICHIGAN, MARYLAND, AND NEBRASKA, AND THE DISTRICT OF COLUMBIA TO THE REPORT OF THE SPECIAL MASTER

James F. Flug*
Lee E. Helfrich
Martin Lobel
LOBEL, NOVINS, LAMONT
& FLUG
1275 K Street, N.W., Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of
Michigan, Frank J. Kelley
Attorney General, and
Maryland, J. Joseph Curran, Jr.
Attorney General

* Counsel of Record
(continued on inside cover)

BEST AVAILABLE COPY

John Payton
Corporation Counsel
Charles L. Reischel
Deputy Corporation
Counsel
Lutz Alexander Prager
Assistant Deputy
Corporation Counsel
District Building, Rm. 305
Washington, D.C. 20004

Attorneys for the District
of Columbia

Don Stenberg
Attorney General
Dale A. Comer
Assistant Attorney
General
2115 State Capitol
Lincoln, NE 68509

Attorneys for the State of
Nebraska

BEST AVAILABLE COPY

EXCEPTIONS

The States of Michigan, Maryland, and Nebraska, and the District of Columbia ("the Undersigned States") believe that the Report of the Special Master proposes a resolution of this case which (a) is generally reasonable, (b) is clearly more consistent with the basic equity principles of *Texas v. New Jersey*, 379 U.S. 674 (1965) than the approaches proposed by New York, Delaware, and the Texas/Alabama group, and (c) satisfies the basic goals of the Undersigned States in their complaint in intervention.

While comfortable with the Master's result, these States believe that the Court can reach the same result by applying the principles enunciated in *Texas v. New Jersey* more directly. The same approach also permits the Court, if it declines to accept the Master's result, to adopt an equitable allocation method, dividing the funds among the states in proportion to each state's share of the relevant commercial activities. For these reasons, the Undersigned States except to the Master's Report as follows:

Exception 1:

The Court can adopt the result recommended by the Master, even if it does not share his view of the *stare decisis* effect of *Pennsylvania v. New York*, 407 U.S. 206 (1972).

Exception 2:

If the Court declines to follow the Master's specific recommendation, it should adopt an equitable allocation method, based on each state's share of relevant commercial activities, to distribute the unclaimed property at issue here.

TABLE OF CONTENTS

EXCEPTIONS i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. THE COURT CAN ADOPT THE MASTER'S RECOMMENDED RESULT BY APPLYING THE BASIC PRINCIPLES OF *TEXAS V. NEW JERSEY* WITHOUT RECOURSE TO THE OLD "BACKUP" RULE. 4

A. The Principles of *Texas v. New Jersey* 4

B. The Special Master's Principles and Reasoning 6

C. *Pennsylvania v. New York* Does Not Require the Court to Apply the Old Backup Rule Here 10

D. The Master's Result Can Be Adopted Directly Under the Principles of *Texas v. New Jersey* If It Is Deemed Fairest and Easy to Apply 14

II. IF THE COURT DECLINES TO FOLLOW THE MASTER'S SPECIFIC RECOMMENDATION, IT SHOULD SELECT AN EQUITABLE ALLOCATION METHOD EFFICIENTLY IMPLEMENTING ITS OWN "COMMERCIAL ACTIVITIES" STANDARD. 17

A. The Equitable Allocation Option 17

B. The Court Is Competent to Adopt an Equitable Allocation Method Based on a Reasonable

Approximation of Each State's Share of the Relevant Commercial Activities 20

C. The Questions Raised By the Master About the Equitable Allocation Option Do Not Present a Barrier to Its Adoption if the Court Does Not Follow the Master's Recommendation 25

CONCLUSION 30

Appendix A-1

TABLE OF AUTHORITIES

CASES

American Trucking Association v. Atchison, Topeka and Santa Fe Railway Co., 387 U.S. 397 (1967) 24

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 6

California v. Acevedo, 500 U.S. -, 111 S. Ct. 1982 (1991) 12

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 24

Coleman v. Miller, 307 U.S. 433 (1939) 25

Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541 (1948) 6

Container Corp. v. Franchise Tax Board, 463 U.S. 159 (1983) 23

Eli Lilly and Co. v. Medtronic, Inc., 872 F.2d 402 (Fed. Cir. 1989), *aff'd*, 496 U.S. 661 (1990) 13

Harmelin v. Michigan, 501 U.S. -, 111 S. Ct. 2680 (1991) 12

Idaho ex rel. Evans v. Oregon, 444 U.S. 380 (1980) . . 25

In re Agent Orange Product Liability Litigation, 597 F.Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) 23

In re Antibiotic Antitrust Actions, 333 F. Supp 278 (S.D.N.Y. 1971) 23

In re Arizona Bakery Products Litigation, 1976-2 Trade Cases ¶ 61,120 (D. Ariz. 1976) 23

In re Stripper Well Exemption Litigation, 653 F.Supp. 108 (D. Kan 1986), aff'd, 855 F.2d 865 (TECA 1985) 22

In re Sugar Industry Antitrust Litigation, 73 F.R.D. 322 (E.D. Pa. 1976) 23

Moorman Manufacturing Co. v. Bair, 437 U.S. 267 (1978) 23

Moragne v. States Marine Line, 398 U.S. 375 (1970) . . 13

Nebraska v. Wyoming, 325 U.S. 589 (1945) . . . 19, 23, 25

Payne v. Tennessee, 501 U.S. -, 111 S. Ct. 2597 (1991) 12

Pennsylvania v. New York, 407 U.S. 206 (1972) . . Passim

Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (5th Cir. 1974) 23

Prudential Insurance Company of America v. Alabama, No. C4937-83E (N.J. Super. Ct. Ch. Div.) 21, 22

Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495 (1988) 25

Rust v. Sullivan, 500 U.S. -, 111 S.Ct 1759 (1991) . . . 24

Security Savings Bank v. California, 263 U.S. 282 (1923) 6

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) . 6

Texas v. New Jersey, 379 U.S. 674 (1965) . . . . . Passim

Texas v. New Mexico, 482 U.S. 124 (1987) 24

Udall v. Tallman, 380 U.S. 1 (1965) 24

United States v. Exxon, 561 F.Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986) 22

United States v. Fausto, 484 U.S. 439 (1988) 13

United States v. Hutcheson, 312 U.S. 219 (1940) 13

West Virginia v. Pfizer, 314 F.Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971) 22

Western Union Telegraph Co. v Pennsylvania, 368 U.S. 71 (1961) 6

STATUTES AND REGULATIONS

12 U.S.C. §§ 2501 - 2503 (1989) 13

MD. CODE ANN. § 10-402 20

MICH. COMP. LAW §§ 208.7, 208.45-208.53 20

N.Y. COMP. CODE R. & REGS., title 20, Chapter 1, Subpart 4-4, § 4-4.3(c) 20, 23

NEW YORK TAX LAW § 210 (McKinney 1986) . . . 20, 23

OHIO REV. CODE § 5733.03 20

TAX INJUNCTION ACT, 28 U.S.C. § 1341 24

OTHER AUTHORITIES

1990 DOW JONES-IRWIN BUSINESS AND INVESTMENT ALMANAC 8

NEW YORK STOCK EXCHANGE, SHAREOWNERSHIP 1985 . . . . . 8, 27

NYSE MEMBER FIRM SALES NETWORKS (May 1989) 8, 27

SEN. REP. NO. 93-505, 93rd Cong., 1st Sess. (1973) . . 13

The 500 By State, Fortune, April 20, 1992, at 290 15

THE WORLD ALMANAC & BOOK OF FACTS 1984 (Newspaper Enterprise Association, 1983) 8

Your Money Matters, Wall St. Journal, May 8, 1992, p. C1 11

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF DELAWARE
Plaintiff,

v.

STATE OF NEW YORK
Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED JANUARY 28, 1992

BRIEF IN SUPPORT OF THE EXCEPTIONS OF THE STATES OF MICHIGAN, MARYLAND, AND NEBRASKA, AND THE DISTRICT OF COLUMBIA, PLAINTIFF-INTERVENORS, TO THE REPORT OF THE SPECIAL MASTER

STATEMENT OF THE CASE

The Undersigned States[1] adopt in general the statement of the case set forth on pages 1-15 of the Report of the Special Master, No. 111 Orig. (January 28, 1992) [hereafter referred to as "Mas. Rep."].

[1] While the District of Columbia did not join the original complaint of the other signatories, it has supported their position and is included in the term "Undersigned States" as used herein.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Undersigned States endorse the Master's result, although we think it is possible to improve upon it. We had proposed that the unclaimed property at issue here be allocated equitably among the states in proportion to the relevant commercial activities in each state.[2] The Special Master's Report, although declining to adopt our approach, satisfies our principal concern. By recommending a solution which does not rely on state of incorporation, the Master's Report avoids the distortions inherent in theories which do, particularly the diversion of a huge amount of unclaimed funds to the one small state where almost all of the national brokerage firms and about half of the large U.S. corporations are incorporated, but where they and their customers conduct only a minuscule portion of their business.

Although the Special Master's alternative, like our own, produces an allocation among the states which is substantially more equitable than the proposals of New York, Delaware, or the Texas/Alabama group, he is hesitant to adopt it (or ours) directly on that basis, because he feels that the *stare decisis* impact of *Pennsylvania v. New York*, 407 U.S. 206 (1972), and "institutional" concerns for Congressional prerogatives, preclude the Court from doing so without dealing with the "backup rule" applied in that case. He therefore reaches his result indirectly. First he "teases out", Mas. Rep. at 50, and resolves an ambiguity as to the identity of the "debtor" in the *Texas v. New Jersey*, 379 U.S. 674 (1965) "backup" rule, as applied here. He decides that the debtor should be the "issuer" of the underlying securities rather than the "holder" of the unclaimed funds. Next he modifies the locational presumption for that debtor, looking to its principal executive office rather than its state of

---

[2] The Master refers to this position as the "California, *et al.*" position. We refer to it here as the "equitable allocation" approach or option.

incorporation.

We believe that the Court may not wish to be so begrudging of its own authority, and may prefer to achieve the Master's result -- or another as least as equitable -- by proceeding directly from the basic principles it enunciated in *Texas v. New Jersey* to achieve a fair and efficient allocation of the funds at issue here. The Court need not be locked to the words and logic of *Pennsylvania v. New York*, a 20-year-old decision which split the Court at the time, was explicitly rejected on its facts by Congress, and was recognized by its author as contradicting the very case which it purported to implement.

It is understandable that the Master, like a lower court judge reluctant to explore the bounds of existing precedent, might have felt the need to dress his result in the raiment of the old formula. But this Court, particularly in a field in which it makes the rules, has full authority to adapt and improve upon its past work, and no obligation to defer to Congress for that purpose, as the Master suggests.

Of course, although we are satisfied with the Master's result, we do want the Court to be aware of our alternative, which, assuring every state a reasonable share of the funds, is more equitable, and is also as convenient. We therefore provide answers to questions that the Report raises about our proposal.

In brief, our option focuses on the fact that the essential goal here is a reasonably fair division among the states of a very large pool of comparatively small items, rather than the tracing of each individual item to a particular state. Thus the Court can and should apply the same type of approximation formula it has long sanctioned for tax allocations, and which many courts have adopted in allocating other fund pools among the states. If the Court adheres to its view that, over time, any inaccuracies in approximated

unclaimed property allocations balance out, then it can approve a broad formula, like the sample we proffered to the Master, which is based on each state's share of relevant commercial activities indicative of the location of the missing beneficial owners, such as stock ownership, registered representatives of brokers, and brokers' offices.

We believe that once the Court endorses such an approach in principle, the states will be able to agree on a precise formula to implement the equitable goal, whether based on the variables we suggested, or other indicia of relevant commercial activities.

ARGUMENT

I. THE COURT CAN ADOPT THE MASTER'S RECOMMENDED RESULT BY APPLYING THE BASIC PRINCIPLES OF *TEXAS v. NEW JERSEY* WITHOUT RECOURSE TO THE OLD "BACKUP" RULE.

A. The Principles Of *Texas v. New Jersey*.

In *Texas v. New Jersey*, 379 U.S. 674 (1965), the Court set forth the guiding principles governing unclaimed property disputes among the states:

> 1. Because individual states lack constitutional power to adopt unclaimed property rules binding on the other states, and because there is no applicable federal statute, the Court, under its original jurisdiction, has the "responsibility" to adopt rules. *Id.* at 677.
>
> 2. Such disputes among the states "should be determined primarily on principles of fairness." *Id.* at

680.[3]

3. The Court looks for a solution which is both "fairest" and "easy to apply." *Id.* at 683.

In applying those principles to the competing state claims to 1730 unclaimed items, totalling $26,461.65, in *Texas v. New Jersey*, the Court provided further specific guidance:

1. To the extent possible, it will focus on the location of the missing owners, or "creditors", rather than that of debtors, so as not "to convert a liability into an asset when the State decides to escheat". *Id.* at 680.

2. Despite "obvious virtues of clarity and ease of application", it will not ordinarily look to corporate domicile, a location which "would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country" to a state in which a corporation "happened to incorporate itself". *Id.*

3. It will look for a solution which "will tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* at 681.

4. Where many small sums of money are involved, ease of administration requires using whatever information is "available", even if inaccurate in particular instances, because any such "errors, if indeed they could be called errors, probably will tend to a large extent to cancel each other out." *Id.* at 681, & n. 11.

---

[3] The Court invokes the concept of fairness or equity five times in the course of its opinion. *See* 379 U.S. at 680, 683.

Implementing these guidelines in *Texas v. New Jersey*, the Court ruled that the funds in that case should go to the state of the creditor's last known address as it appeared on the books and records of the debtor. Faced with the problem, "likely to arise with comparative infrequency", of instances where there was no address of the creditor or where the law of the creditor's state had no applicable escheat law, the Court, to provide "needed certainty," and despite its reluctance to use state of incorporation as a general rule, allowed the debtor's state of incorporation "to cut off the claims of private persons only, retaining the property for itself only until some other state comes forward with proof that it has a superior right to escheat." *Id.* at 682.

Justice Stewart, dissenting, argued that "adherence to settled precedent" required following the Court's earlier cases[4] holding that "where the creditor has disappeared, the State of the debtor's domicile may escheat the intangible property". *Id.* at 683. But all the other members of the Court rejected this view, noting that none of these cases involved conflicting state claims. *Id.* at 682 n.13, *citing Western Union Telegraph Co. v Pennsylvania*, 368 U.S. 71,77-78 (1961). *See also Standard Oil Co. v. New Jersey*, 341 U.S. 428, 443 (1951).

B. The Special Master's Principles And Reasoning.

In enunciating the principles guiding his recommendation, the Special Master carries forward the Court's priorities in *Texas v. New Jersey*.

---

[4] Justice Stewart cited *Standard Oil Co. v. New Jersey*, 341 U.S. 428 (1951); *Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *Security Savings Bank v. California*, 263 U.S. 282 (1923). 379 U.S. at 683. *But see Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948).

The Master begins by recognizing that the Court's "*preferred*" goal, Mas. Rep. at 39 (emphasis in original), is to have the unclaimed funds reach the location of the missing beneficial owner of the property. The Court created the last known address presumption as a "proxy for the location of the beneficial owner." Mas. Rep. at 41. It seeks to find the "*ultimate intended beneficiary*, not the various intermediate points in the process of transmitting the funds." *Id.* at 64 (emphasis in original). When this preferred goal is unobtainable, then the Court will seek a convenient, but still fair, allocation to a state with "relevance," *id.* at 43 n.41, to the property at issue. In picking its locational proxies, the Court can use any "sensible" method. *Id.* at 45. Moreover, since the Court is making an essentially equitable judgment, it can view the "global" qualities of its choice, even though these will not "always" exactly reflect the "real world" factors. *Id.* at 46-47. As long as it gets a "decent handle" on a location that is both convenient and fair, *id.* 45-46, it need not precisely capture "the full range of factors one would want to consider in the abstract." *Id.* at 45.

Despite the seeming breadth and flexibility of his view of the Court's authority, the Master concludes that the Court is bound by the ruling of the majority in *Pennsylvania v. New York*, 407 U.S. 206 (1972), that the Court must adhere to the 1965 "backup rule" (state of incorporation of debtor) whenever the "primary rule" (state of last known address of the creditor from the debtor's records) fails to "produce an appropriate jurisdiction" for the property at issue here. Mas. Rep. at 51. The Master recognizes that reflexive application of the old backup rule might send an extremely disproportionate share[5] of the huge fund at issue to a single

---

[5] As the Master pointed out, over 50% of the "Fortune 500" largest companies and over 40% of the companies listed on the New York Stock Exchange are incorporated in Delaware. Mas. Rep. at 47 n.43. Moreover, 48 brokers are incorporated in Delaware, including 13 of the

state at the expense of all the other states.[6] *Id.* at 47, 52, App. B at B-25. Nevertheless, since the *Pennsylvania v. New York* majority, in the face of similar complaints, refused to adapt the Court's prior general rule to the particular facts before it, the Master concludes that the Court cannot do so here, for example, by adopting a substitute proxy for the locations of the beneficial owners. *Id.* at 50-53. He believes that such a step is not within the Court's competence, but would require Congressional action. *Id.* at 53-54.

He therefore attempts to apply the "backup rule" or "cleanup rule" of *Texas v. New Jersey*, a "rule of convenience," Mas. Rep. at 44, adopted to cover small

---

top 15 listed in the 1990 DOW JONES-IRWIN BUSINESS AND INVESTMENT ALMANAC, at pp. 229-230. Those 13 Delaware-incorporated brokers hold 92% of the total consolidated capital held by the top 15, and, overall, Delaware-incorporated brokers hold 78% of the total consolidated capital held by the top 100 U.S. brokers. *See* Response of the Designated States in Opposition to the Dispositive Motions of New York, Delaware, Texas, *et al.*, and Alabama *et al.*, Against the Complaint of the Designated States, No. 111 Orig., at 8 n.8 (December 18, 1990).

[6] Delaware had a 1980 population of about 600,000, or roughly 0.3% of the national population. THE WORLD ALMANAC & BOOK OF FACTS 1984 (Newspaper Enterprise Association, 1983). It ranked 46th in the New York Stock Exchange 1985 survey of shareholders, with about 0.3% of the nation's shareholders. Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island to the First Set of Interrogatories Propounded By the States of Alabama, *et al.*, and to the First Request for the Production of Documents From the States of Alabama, *et al.*, No. 111 Orig.; Exhibit 1 (July 18, 1990) (NEW YORK STOCK EXCHANGE, SHAREOWNERSHIP 1985). According to 1988 figures, Delaware had about 204 of the nation's almost 80,000 registered representatives (individual brokers), or about 0.3%, and 20 of the over 6500 broker branch offices, or about 0.3%. *Id.*, Exhibit 2 (NYSE MEMBER FIRM SALES NETWORKS (MAY 1989)). The Master clearly preferred to avoid this windfall to a state which is almost never the locus of the missing beneficial owners, or the situs of any significant portion of the directly relevant commercial activities.

amounts of funds not covered by the primary rule in that case. Yet he finds that this rule also raises problems in the present case. Delaware argued that the rule means "state of incorporation of the holder" of the unclaimed distributions here. Texas/Alabama argued that the rule means "state of incorporation of the issuer" of the underlying securities. He sees these alternatives as equally convenient, but, as between them, finds the "issuer", which was the source of the unclaimed funds, to be a more "equitable" focus than the "holder", an intermediary which never had any claim to the funds. *Id.* at 35 n.32.

The Master then confronts the fact that domicile of the issuer, like domicile of the holder, presents the very inequity the Court was unwilling to countenance in *Texas v. New Jersey* -- diversion of large amounts of property as a windfall to states of incorporation. Although Delaware contended that *stare decisis* also required adherence to this locational proxy and that only Congress could change it, *see* Mas. Rep. at 44-45, the Master concludes that the use of state of incorporation is "not compelled", *id.* at 41, and that the Court can fashion a convenient rule for locating the "debtor." *Id.* at 44-45. Citing the Court's criticism of state of incorporation, *id.* at 46, and offering his own opinion that use of state of incorporation, as both Delaware and Texas/Alabama had urged, is "quite unfair", *id.* at 47, he chooses state of principal executive office as the locational surrogate because it is "much more fair," *id.* at 46, and will provide a "much superior allocation among the jurisdictions", even though not always precisely reflective of relevant commercial activities. *Id.* at 47.

Thus by a two-step process of defining "debtor" in the existing backup rule as "issuer", and changing the locational proxy from state of incorporation to state of principal office of the debtor, the Master arrives at his proposed rule for this case: state of principal executive office of the issuer of the

underlying securities.[7]

C. *Pennsylvania v. New York* Does Not Require the Court to Apply the Old Backup Rule Here

We submit that the Court is not as constrained as the Master felt it was by any *stare decisis* effect of the holding in *Pennsylvania v. New York*. Despite the Master's (and Delaware's) limited views of the Court's power, the Court's authority here is ample to reach the Master's result directly rather than through the indirect route he follows.

Pennsylvania v. New York dealt with some $1.5 million of unclaimed Western Union money orders, most of which appeared to have no last known address for either the sender or the payee.[8] Conceding that there was "some inconsistency" between its position and the Court's "refusal in *Texas* to make the debtor's domicile the primary recipient of unclaimed intangibles," the majority held that neither the likelihood of a "windfall" to Western Union's domicile, New York, nor the "higher percentage of unknown addresses" in the case justified it "to vary the application of the Texas rule."[9] 407 U.S. at 214-215. The majority did not consider the high proportion of no-address funds sufficient reason to alter the rule, since the

---

[7] It is not entirely clear whether the Master intends these changes to constitute a general revision in the backup rule, applicable to all property in all circumstances, or merely a revision applicable to the circumstances of this case.

[8] The case does not indicate what percentage of the $1.5 million in unclaimed property lacked address identification. The majority noted that records did exist that may provide "a substantial number of creditors' addresses." 407 U.S. at 215.

[9] Because Western Union was incorporated in New York, the entire amount of no-address funds would go to that state, although the missing owners were clearly located throughout the United States and the places of their purchases of the money orders were known.

Court would not know where the line should be drawn. *Id.*

Of course, the Court need not reach the *stare decisis* question at all if it concludes that the facts of the present case are distinguishable from those in *Pennsylvania v. New York*. *Delaware v. New York* involves at least $360 million, Mas. Rep. at 10 n.9, and probably substantially more,[10] of no-address funds -- over 13,000 times the amount at issue in *Texas v. New Jersey*. There can be no doubt that any reasonable demarkation line has been crossed here, whether or not the uncertain amount at stake in the 1972 case sufficed to cross it. Whereas, in that case the "windfall" to one large state was at most $1.5 million, here one very small state[11] might receive a minimum of $70 million more than its fair share if state of incorporation is used at all.[12] On this basis alone, the Court is free to exercise its equitable discretion

---

[10] The $360 million figure is based on estimates of the amounts turned over to New York between 1985 and 1989. Mas. Rep. at 10 n.9. The present case covers "decades" of such payments, *id.* at 61, 70, and affects funds which holders have refused to turn over to New York. *See* Brief in Support of Motion of Plaintiff-Intervenors California, Maryland, Michigan, Nebraska, Ohio and Rhode Island for an Initial Ruling Under Litigation Orders Nos. 1 and 2, No. 111 Orig., at 1 (October 30, 1990) (hereafter referred to as "October 1990 Brief"). Thus the amount at issue here is likely to be substantially in excess of that figure.

[11] Based on the statistics cited in note 6 *supra*, Delaware's equitable share should be about 0.3%, or about $1.1 million if $360 million is allocated.

[12] As noted previously (*supra* note 5), it is estimated that at least 40-50% of public corporations and a much higher percentage of large securities firms, are incorporated in Delaware. Corporate issues are much more widely traded in secondary markets than municipal issues. *See Your Money Matters*, Wall St. Journal, May 8, 1992, p. C1. Thus, well over 50% of the amount here involved should be attributable to corporate issues. On this basis, Delaware would receive over 40% of over 50%, of over $360 million, or well over $72 million, under the Texas/Alabama approach and perhaps several times that amount under the Delaware approach.

unfettered by the result in *Pennsylvania v. New York*.

In any event, the *Pennsylvania v. New York* decision should not, under this Court's *stare decisis* standards,[13] be weighed heavily in determining the scope of the Court's discretion here. As noted above, the majority itself recognized the potential inequity or "windfall" inherent in its decision, and conceded that its result might be inconsistent with *Texas v. New Jersey*. The Court was sharply divided, with an extensive, well-reasoned dissent that might seem the more persuasive position to many readers today, especially in the context of the present case. The essence of the dissenters' argument was that "[p]aradoxically, the mechanistic application of the *Texas v. New Jersey* rule to the present case leads ultimately to the defeat of each of the beneficial justifications for that rule." 407 U.S. at 218 (Powell, J., dissenting, joined by Blackmun, J. and Rehnquist, J.).[14]

In fact, the dissent was so persuasive that Congress explicitly endorsed and adopted it in a statute reversing the

---

[13] *See e.g.*, *Harmelin v. Michigan*, 501 U.S. -, 111 S. Ct. 2680 (1991) 115; *Payne v. Tennessee*, 501 U.S. -, 111 S. Ct. 2597 (1991); *California v. Acevedo*, 500 U.S. -, 111 S. Ct. 1982 (1991).

[14] "The fact that the Court was willing to permit this result [payment to debtor's state of incorporation] in the few cases in which no record of address was available or in which no law of escheat governed, does not diminish the clear view of the Court that this result would be impermissible as a basis for disposing of more than a small minority of the debts. Yet the decision today ignores the Court's unwillingness to 'exalt' the largely coincidental domicile of the corporate debtor. It also disregards the Court's clearly expressed intent that the escheatable property be distributed in proportions roughly comparable to the volume of transactions conducted in each State." 407 U.S. at 219 (Powell, J., dissenting).

majority's result on the facts of the case.[15] Whether or not the Court should now be guided in its action by the Congressional enactment or merely, in the Master's words, treat it as "a general change in the body of law and legislation since 1965 that the Court *may* want to consider," Mas. Rep. at 41 n.37 (emphasis in original), on its facts, the precedent has clearly been vitiated, and should carry little, if any, weight.[16]

---

[15] *See* 12 U.S.C. §§ 2501 - 2503 (1989). The 1973 Senate Report on what is now 12 U.S.C. §§ 2501 - 2503 started from the premise that "the effect of a recent United States Supreme Court decision currently results in inhibiting such an equitable distribution. In order to resolve these conflicts and assure that each state receives its fair share of the proceeds of these instruments," legislation altering the result in *Pennsylvania v. New York* was necessary. The Report included and adopted the recommendations in a letter from the Chairman of the Federal Reserve Board which cited the dissenting opinion of Justice Powell, and called "distribution of funds based solely upon the location of a debtor's corporate domicile" an "obvious inequity." The Committee concluded that the legislation, which allocated money orders and travellers checks in a manner similar to that proposed in Justice Powell's dissent, was "far better than continuing to permit a relatively few states to claim these sums solely because the seller is domiciled in that State, even though the entire transaction took place in another state." SEN. REP. NO. 93-505, 93rd Cong., 1st Sess. at 3, 6 (1973).

[16] If, as the Master believes, the present facts are indistinguishable from the 1972 facts, then that case has no precedential value, since on its facts it has been legislatively reversed. If the facts here are sufficiently distinct to avoid the impact of the legislative reversal, then they are also different enough to distinguish the judicial precedent. As the Federal Circuit has pointed out, where Congress has explicitly reversed a court ruling, it makes little sense for a later court to extend the precedential impact of that ruling beyond the bounds of its specific facts when it has no value on its own facts. *Eli Lilly and Co. v. Medtronic, Inc.*, 872 F.2d 402, 406 (Fed. Cir. 1989), *aff'd*, 496 U.S. 661 (1990). *Cf. United States v. Fausto*, 484 U.S. 439, 453 (1988); *Moragne v. States Marine Line*, 398 U.S. 375, 390-392 (1970); *United States v. Hutcheson*, 312 U.S. 219, 235 (1940).

In short, instead of following the Master's course of dissecting and reconstructing the old backup rule to avoid conflict with *Pennsylvania v. New York*, the Court is free to address this case in terms of the basic principles of *Texas v. New Jersey*, and to adopt a solution which follows the broad spirit of those principles rather than their specific application in a particular case involving a relatively modest amount of unclaimed funds.

D. The Master's Result Can Be Adopted Directly Under the Principles of *Texas v. New Jersey* If It Is Deemed Fairest and Easy to Apply

The Master's view of the case placed him on the horns of a dilemma. If, as he concluded in deciding how to deal with massive no-address situations, *Pennsylvania v. New York* had *stare decisis* effect, then he could not overtly depart from the old rule. Yet the gross unfairness of a Delaware-biased result in this case cried out for equitable relief. That is why he was forced first to "tease out an ambiguity," in the meaning of "debtor", and then to adopt his change in the locational surrogate from state of incorporation to principal executive office. Mas. Rep. at 50.

Certainly there is nothing unreasonable in either of those circumnavigations, and they are an acceptable means of avoiding the dilemma. However, if *Pennsylvania v. New York* is not controlling, there is no dilemma. The Court can return to the basic principles of *Texas v. New Jersey*, well articulated by the Master, and directly and forthrightly select the option that maximizes fairness among the states and that the states can implement easily.

By these standards, comparing the Master's result to the incorporation-based proposals of Delaware and

Texas/Alabama, the Master's position must surely prevail.[17] Whether denominated as a "primary" or "backup" rule, the essence of the Master's result is that (a) in a case like this, where the "holders" are transparent intermediaries, *see* Mas. Rep. at 36, serving the interests of issuers, transferors, and transferees of securities, the location of the intermediary is less relevant than that of the principals; and (b) as *Texas v. New Jersey* held, state of incorporation is not an equitable proxy for location, at least where substantial amounts are at issue. Simply stated, the Court can adopt a "principal place of business of the issuer" rule directly, as a choice which is both fair and convenient, without talmudic examination of the term "debtor," the U.C.C., or other niceties of the old backup rule. This locational indicator does not have the Delaware-bias of state of incorporation.[18] And the Master has adequately addressed the Court's prior concern that such a proxy would be too vague[19] by recommending use of a convenient, objective version of this surrogate contained in the SEC 10-K forms.

The Court can, if it wishes, salvage some of the structure of the old formulation, making only "a relatively minor but logical deviation in the manner in which that rule is implemented in this case," 407 U.S. at 219 (Powell, J., dissenting), by framing the rule here as encompassing the "last known address of the last known owner of the property." The

---

[17] The Master dealt fully and persuasively with the New York position, reminiscent of that of Texas in *Texas v. New Jersey*, which shifts for each type of property so that any class of property goes to the proponent. *See* 379 U.S. at 678.

[18] Compared to the 40-50% of large corporations estimated to be domiciled in Delaware, the number of Fortune 500 corporations headquartered there is 4, or 0.8%. *The 500 By State*, Fortune, April 20, 1992, at 290.

[19] *Texas v. New Jersey*, 379 U.S. at 680.

circumstances leading to this unclaimed property may involve three different owners. Without delving into the "myriad details,"[20] they are the issuer of the security, an unknown investor who was the previous beneficial owner but transferred his interest before the relevant date,[21] and the transferee of the beneficial interest -- the missing true owner. *See* discussion, *infra* note 22. The property at issue is unclaimed because neither the previous or present owner of the underlying security ended up with the distribution, and the intermediary, who does hold it, cannot figure out who they are, let alone their addresses. By process of elimination, the issuer is the last known owner of the property (even though the asset became a liability for him once the distribution was declared). Thus because the issuer is known and its address (i.e., principal office per SEC filings) is "available," 379 U.S. at 681 & n.11, in public records, if not in the holder's books, it is convenient to use this proxy for the last known address of the last known owner.

But the Court need not even go through that semantic exercise. It can directly adopt the Master's option because it is fairer than the New York, Delaware, or Texas/Alabama proposals, and about as easy to apply. Thus under the standards of *Texas v. New Jersey*, the Court can select it, without regard to whether it is congruent with the holding in *Pennsylvania v. New York* or whether it is more than a "minor change" in the prior "backup" rule. Mas. Rep. at 49.

---

[20] Mas. Rep. at 9.

[21] In the simplest circumstance, where the holder has merely erroneously failed to pay a distribution to its own customer, there would be no prior investor involved.

II. IF THE COURT DECLINES TO FOLLOW THE MASTER'S SPECIFIC RECOMMENDATION, IT SHOULD SELECT AN EQUITABLE ALLOCATION METHOD EFFICIENTLY IMPLEMENTING ITS OWN "COMMERCIAL ACTIVITIES" STANDARD.

The fifth option before the Court, "equitable allocation" in proportion to relevant commercial activities, was presented in complaints in intervention filed by six states, which were not satisfied with the prior state positions, but which, of course, had not yet seen the Master's proposal, first presented in his June 1991 draft Report. As already noted, the Undersigned States consider the Master's result a vast improvement over the proposals of Delaware, New York, and the Texas/Alabama states. However, if the Court does not adopt the Master's option, we continue to believe that the equitable allocation option presents an alternative which is both fair and "easy to apply" within the meaning of *Texas v. New Jersey*, 379 U.S. at 683.

A. The Equitable Allocation Option.

The Master, although declining to recommend the equitable allocation option, concedes that it is a course which "the Court admittedly has the power" to adopt. Mas. Rep. at 53. He also raises questions about it, which these Exceptions seek to answer, so that the Court is able to consider this option alongside the others.

The equitable allocation option proceeds directly from the basic *Texas v. New Jersey* principle, to which the Master also subscribes, that the Court's primary goal is to adopt an allocation that focuses on the locations of the missing beneficial owners. This option utilizes an allocation among the states proportional to the relevant commercial activities which

gave rise to the unclaimed property.[22] Recognizing that the challenge facing the Court here is not to validate the escheat of particular unclaimed items but to divide a large pool of clearly unclaimed funds among the states, the equitable allocation approach seeks to maximize efficiency by providing a formula allocation applicable to the entire pool or to large sub-pools, without attempting item-by-item assignments of the escheatable property to particular states.

The Master made clear that his preliminary factfinding phase of the case was not the time to present or consider the intricacies of implementing whatever general rule was

---

[22] As described by the Master, this property becomes unclaimed when payments by an issuer get "stuck with one of the intermediaries because that intermediary is unable to determine to whom it should transmit the funds it is holding." Mas. Rep. at 10. "[T]he essential point is that the payments do not make it from the issuer to the beneficial owner." *Id.* at 10-11. Thus, these overages held by the intermediaries would not arise if some beneficial owner for whom the intermediary is acting had not held the security in the first place. And, the overages would not normally arise if that last beneficial owner had not engaged in some commercial activity with the security which led to the discrepency. *See, e.g.*, Mas. Rep., Appendix B, at B-2 (finding 6), B-3 (finding 10); B-10 -- B-12 (findings 36, 37, 39, 40, 41, 42); B-16 -- B-17 (findings 57, 58, 59); B-18 -- B-19 (findings 62, 63, 64); B-21 (findings 74, 77); B-23 n.4. These beneficial owners, of course, reside throughout the United States and initiate these commercial transactions through brokers and other intermediaries who conduct their securities business through local registered representatives in local branch offices everywhere in the nation. Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island To the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, and to the First Request For the Production of Documents From the States of Alabama, *et al.*, No. 111 Orig., Exhibit 2 (July 18, 1990); Shearer Dep., pp. 16-18, 21-22, 29, 56-58, 61, 434-435; Cirrito Dep., pp. 14-16, 17-18, 91-92, 147; Principe Dep., pp. 24, 27-29, 32-34, 45, 105, 159; DeCesare Dep., pp. 17, 32; Merrill Lynch Exhibit No. 14, pp. 255-259.

adopted.[23] Nor did the proponents of the equitable allocation option want to prescribe a particular formula without input, and, they hoped, agreement, from the other states, if the Court adopted that option.[24] Nevertheless, the proponents of this option did present examples of how it might work.

In its simplest form, the equitable allocation option would provide the states with a single formula for allocating all of the property at issue now held by New York or already subject to state reporting. *See* Appendix A.[25] In the example presented, the suggested formula (located in the column marked "Avg. %" in Appendix A, at A-1, A-3) was derived

---

[23] *See* Litigation Management Order No. 2, at 2 (July 16, 1990) (noting that the Master has not permitted "in the case of ... California, et al., discovery into the exact percentage of various commercial activities approximately allocated to each State" but only discovery on issues "such as the ease of discerning an appropriate 'commercial activities' test"); Discovery Order No. 10 at 2 (July 11, 1990) (noting discovery limited to elucidating "the legal theories of the parties, including the various views of the application of the Supreme Court's precedent to the issues at stake here"). *See also* Litigation Management Order No. 1 (October 18, 1989); Discovery Order No. 9 (June 14, 1990).

[24] The Court has, in the past, expressed its hope that states can reach negotiated resolutions of their disputes. *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945). We note that the actual mechanics of allocation were also left open in this Court's prior escheat cases. For example, the subsequent history of *Pennsylvania v. New York* reveals that the states agreed on a cost-saving system of aggregation and sampling to simplify the process of allocating the unclaimed money orders among the states. *See* Brief In Opposition To Motion For Leave To File Complaint (New York) at 31 (May 9, 1988).

[25] Appendix A reproduces Attachment A to the Reply of the Designated States to the Briefs In Opposition To The Motion of the Designated States for a Dispositive Order, No. 111 Orig., (January 17, 1990). It consists of two spreadsheets, one showing a sample formula, pp. A-1 - A-4, and the other showing that formula applied to a specific pool of funds, pp. A-5 - A-8, resulting in a "State Share" for each state. Also included were instructions for utilizing the spreadsheet program, p. A-9.

from three readily available indicators of individual investment activity in the several states: number of shareholders, branch offices of brokers, and registered brokerage representatives. The average of a state's percentages of these variables served as a global proxy for each state's share of the missing beneficial owners of the securities distributions, whose commercial activities throughout the country (and in no way related to the location of the "debtor" however defined) in owning, selling, and buying the underlying securities were the proximate cause of the unclaimed property.

Among the several alternative formulas we suggested was holder-by-holder allocation. *See* Brief in Support of Motion of Plaintiff-Intervenors California, Michigan, Nebraska, Ohio and Rhode Island, for an Initial Ruling Under Litigation Orders Nos. 1 and 2, at 44 (October 30, 1990). Under this possibly more accurate, but somewhat less convenient approach, each broker would allocate all "excess" funds reported each year in accordance with the share of that holder's retail investment business in each state, information which most holders and many states have readily at hand,[26] or can obtain.[27]

B. The Court Is Competent To Adopt An Equitable Allocation Method Based On A Reasonable Approximation Of Each State's Share Of The Relevant Commercial Activities.

The Master concedes that the Court has the "power" to

---

[26] *See, e.g.*, NEW YORK TAX LAW §210 (McKinney 1986); N.Y. COMP. CODE R. & REGS., title 20, Chapter 1, Subpart 4-4, §4-4.3(c); MD. CODE ANN. §10-402; MICH. COMP. LAW §§208.7, 208.45-208.53; OHIO REV. CODE §5733.03.

[27] *Cf. Pennsylvania v. New York*, 407 U.S. at 215, where the Court noted that, in the future, the states could require Western Union to keep the data needed for better allocation.

adopt the equitable allocation option. Mas. Rep. at 53. And his emphatic focus on the states of the beneficial owners as the superior claimants coincides with the primary focus of the equitable allocation approach. *Id.* at 56. Moreover, his understanding of the general factual background of the property at issue is congruent with our view that transfers of ownership or of evidence of ownership among the customers of the intermediaries (the missing "beneficial owners") are what typically gives rise to the "excess" funds at issue here.[28] Nevertheless, he concludes that *stare decisis* and the Court's lack of "institutional competence" bar the exercise of the Court's power. *Id.* at 53.

We have already discussed why *Pennsylvania v. New York* does not bar "reconsideration" of the old backup rule as it might apply to this case. Even the Master recognizes that, "because of the large sums involved, this case tests the general appropriateness of the backup rule as severely as can be imagined." Mas. Rep. at 56. Thus the Court is free to consider how "the reasons underlying *Texas v. New Jersey* could best be effectuated", in the words of the dissenters in *Pennsylvania v. New York*. 407 U.S. at 219. Certainly the three dissenting Justices believed that the Court was fully able, where the search for the last known addresses of the true owners is "fruitless," to use some other "rough indicator" of the owners' locations. *Id.* Such an approach, they said, should be "generally reliable," "providing a reasonable approximation," even if not "perfection" or "absolute fairness". *Id.* at 221.

The task here is the not unusual one of judicial supervision of the division of a fixed fund among competing claimants. Courts in general, and this Court in particular, are not strangers to use of global formulas in such situations. In *Prudential Insurance Company of America v. Alabama*, No.

---

[28] *See* note 22, *supra*.

C4937-83E (N.J. Super. Ct. Ch. Div.), for example, a statistical process was used, by agreement of the 49 state parties, to allocate certain unclaimed insurance company dividends. Instead of incurring the substantial expense of individually analyzing the state of last known address for many thousands of uncashed checks, the states agreed on a formula:

> derived from a weighted average of the percent of total benefits, total insurance in force, and total premiums paid in each state during the period 1967 to 1983. (This period was selected based on the availability of records and approximately 80% of the outstanding checks were issued during this period ....)

Report of Lead Counsel in *Prudential* at 8, cited by New York in Brief In Opposition To Motion For Leave To File Complaint, No. 111 Orig., at 31 n.22 (May 9, 1988), and lodged with the Court by New York.

Similarly, in *United States v. Exxon*, 561 F.Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986), the District Court ordered the distribution of over $2 billion of oil overcharge refunds to the states, on behalf of their injured citizens, in accordance with a formula reflecting the proportional usage of oil products in the several states. A similar formula was implemented in *In re Stripper Well Exemption Litigation*, 653 F.Supp. 108, 117 (D. Kan 1986), *aff'd*, 855 F.2d 865 (TECA 1985), for the distribution to the states of a major share of what was expected to be over $4-5 billion of such overcharges. Similarly, in *West Virginia v. Pfizer*, 314 F.Supp. 710, 729 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971), antitrust damages attributable to the sale of pharmaceuticals were distributed among the states in accordance with an allocation based on published figures for the average number of beds in the affected hospitals in

each state during the period.[29]

This Court is also quite familiar with such geographical allocation formulas from its review -- and approval -- of such mechanisms, adopted by the states themselves for the attribution of portions of corporate income to individual states for tax purposes. *See, e.g., Container Corp. v. Franchise Tax Board*, 463 U.S. 159 (1983); *Moorman Manufacturing Co. v. Bair*, 437 U.S. 267 (1978). While in this case it is likely that the states would jointly propose the specific details of an agreed upon formula if the Court adopts the equitable allocation approach in principle,[30] the Court itself, in original action cases, has sometimes been called upon to decree complex allocation formulas where the states cannot agree.[31]

In all of these cases, the courts have accepted various proxies for unknown -- and usually unknowable -- "true

---

[29] *See also, e.g., In re Sugar Industry Antitrust Litigation*, 73 F.R.D. 322, 350-355 (E.D. Pa. 1976) (use of statistics, formulas and approximations to determine common fund amounts); *In re Arizona Bakery Products Litigation*, 1976-2 Trade Cases ¶ 61,120 (D. Ariz. 1976) (use of sample data to calculate damages of consumers); *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974) (computation of back pay awards through use of formulas); *In re Antibiotic Antitrust Actions*, 333 F. Supp 278, 289 (S.D.N.Y. 1971) (use of statistics, formulas and approximations to determine common fund amounts); *In re Agent Orange Product Liability Litigation*, 597 F.Supp. 740, 823 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987) (discussing cases allocating liability based on market shares).

[30] This occurred in all of the cases cited in the text. If New York refused to join in, its equitable share could easily be determined from the records it collects from all brokers doing business in the state, which are required to report for state tax purposes the proportion of their securities brokerage business done in New York. NEW YORK TAX LAW §210 (McKinney 1986); N.Y. COMP. CODE R. & REGS., title 20, Chapter 1, Subpart 4-4.3(c).

[31] *See, e.g., Nebraska v. Wyoming*, 325 U.S. 589 (1945).

facts". The proxies have not been "perfect", but they give the kind of "generally reliable" outcomes and "reasonable approximations" which the *Pennsylvania v. New York* dissenters thought was appropriate in unclaimed property cases. 407 U.S. at 221. Nevertheless the Master argues that only Congress is capable of dealing with such issues. He suggests that the Court should not attempt to do more than set "the general rule," Mas. Rep. at 54, letting Congress apply or revise the Court's rule as the "arbiter," *id.* at 53, in particular cases. Perhaps we have misunderstood the Master's point, but we had thought that the constitutional structure was the reverse: that ordinarily Congress makes the rules, and the judiciary is the arbiter of their equitable implementation in particular cases. *See, e.g., Texas v. New Mexico*, 482 U.S. 124 (1987) (Congressionally approved compact did not preclude Court from potential award of damages for breach). Thus, *a fortiori*, where the Court is, as it is here, itself the rule-giver,[32] its power to interpret, elaborate upon, clarify, and revise its own rules should be even broader, rather than narrower, than usual.[33]

There are instances where Congress has explicitly directed the federal courts to refrain from action. *See, e.g.*, Tax Injunction Act, 28 U.S.C. § 1341. And there are cases where the courts decline to act because the separation of powers places responsibility for political questions in the

---

[32] *Texas v. New Jersey*, 379 U.S. at 677.

[33] *Cf. American Trucking Association v. Atchison, Topeka and Santa Fe Railway Co.*, 387 U.S. 397, 416 (1967) (agencies should be free to adapt rules to changed circumstances); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965) (substantial deference owed to agency's construction of own rules). *See also Rust v. Sullivan*, 500 U.S. -, 111 S.Ct 1759 (1991) (agency change in interpretation of statute justified where prior construction and rules failed to implement intent; continued deference to interpretation owed); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 863, 863-864 (1984) (same).

hands of Congress. *E.g.*, *Coleman v. Miller*, 307 U.S. 433 (1939). But, just as Congressional silence cannot preclude state action in a field where the states otherwise have authority to act, *Puerto Rico Department of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988), in the absence of Congressional action, the Court does not defer to Congress to resolve disputes before the Court, especially when those disputes are over the interpretation and application of rules promulgated by the Court itself under its original jurisdiction authority.[34]

C. The Questions Raised By the Master About the Equitable Allocation Option Do Not Present a Barrier to Its Adoption if the Court Does Not Follow the Master's Recommendation

The Master concedes that, although he has practical concerns about the equitable allocation option, "I do not mean

---

[34] The Master suggests that an equitable solution for this case must be left to Congress because this case is too "complex" for this Court. Mas. Rep. at 54. In *Idaho ex rel. Evans v. Oregon*, 444 U.S. 380, 390 n.7 (1980), this Court responded to a similar concern by a Special Master where the Court was asked to undertake a much more complex task in an original action:

> The Special Master also implied that he felt dismissal was warranted because of the complexity of apportioning [the fish runs at issue] ... and because this Court might have to retain continuing jurisdiction over the management of the fisheries .... We rejected a similar argument in *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945), a case involving apportionment of water:
>
> > There is some suggestion that if we undertake an apportionment of the waters of this interstate river, we embark upon an enterprise involving administrative functions beyond our province.... But the efforts at settlement of this case have failed. A genuine controversy exists.... The difficulties of drafting and enforcing a decree are no justification for us to refuse to perform the important function entrusted to us by the Constitution.

to suggest that they cut decisively against adoption of such a rule." Mas. Rep. at 55. His concerns are easily answered:

1. He apparently would prefer a formula that looks at the distribution of owners of *each* security, rather than one that uses estimates of the distribution of ownership of *all* securities. As our submissions to him suggested, such an allocation is theoretically possible. October 1990 Brief at 44-45. But the states are unlikely to want to incur the additional cost of such disaggregation unless they believe that it would produce a significantly different and more accurate result, a counterintuitive supposition for this very large universe of mostly small transactions involving all securities over an extended time period.

2. The Master apparently considers the rough correlation between the allocation under our sample formula and the state-by-state population distribution to be a negative factor. On the contrary, that correlation suggests that the independently derived securities-related factors used in our sample produce a reasonably useful measure of investment activity. It is individuals in every state who are responsible for such activity. Thus populations, adjusted for relative average incomes, are likely to explain most of the state-to-state difference. Certainly, the Court should be much more comfortable with a locational surrogate which arrays the states in approximately the same order as population, than with a surrogate (like state of incorporation) under which a state with a fraction of 1% of population (and of shareholders, registered representatives, and broker branch offices) would receive 20% or more of a half-billion dollar fund.

3. The Master suggests that only the broadest outline of the equitable allocation rule has been proffered, "with few details". Mas. Rep. at 53. In fact, as noted above, the Master himself advised the parties not to address explicit implementation issues at this stage of the case (*see* note 23, *supra*), and the proponents of this option did not want to

presume that they could speak for all the states as to the precise formula to be used if the Court did adopt their general approach. Nevertheless, a quite specific example of an implementation formula was presented to the Master and the other states, and is appended to this filing for the Court's convenience. *See* Appendix A.[35] Prior to the Master's Report, all of the other states except Delaware and New York stated their willingness to accept this general approach as an alternative if their approach was not adopted.[36]

4. Despite the absence of "details", the Master opined that the equitable allocation approach would be."difficult to administer". Mas. Rep. at 54. In all candor, we cannot understand this criticism. Precisely for the reasons the Master sees as flaws-- its global approach and its openness to flexible implementation procedures yet to be devised by the states --

---

[35] The sample formula consisted of a simple average of three indicators of state-by-state investment activity over a period of years: each state's percentage of all shareholders, of all registered representatives (individual brokers), and of all brokers' branch offices. The data was derived from statistics published in NEW YORK STOCK EXCHANGE, SHAREOWNERSHIP 1985 and NYSE MEMBER FIRM SALES NETWORKS (May 1989) and is attached as Exhibits 1 and 2 of Response of the States of California, Michigan, Nebraska, Ohio, and Rhode Island to the First Set of Interrogatories Propounded By the States of Alabama, *et al.*, And To The First Request For Production of Documents From the States of Alabama, *et al.*, No. 111 Orig. (July 18, 1990).

[36] *See* Brief In Support of Motion of the States of Arizona, Connecticut, Colorado, Idaho, Minnesota, New Mexico, North Carolina, South Carolina, Tennessee, Texas and Wisconsin For Judgment On the Pleadings, No. 111 Orig., at 7 n.4 (October 30, 1990); Brief in Support of Motion for Partial Summary Judgment of the Plaintiff-Intervenor States of Alabama, Alaska, Arkansas, Florida, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming and the Commonwealths of Kentucky and Pennsylvania, No. 111 Orig., at 76 n.108 (October 30, 1990).

the equitable allocation option would probably be at least as easy to administer as the Master's approach. In fact, the sample equitable allocation formula was presented to the Master and the other states in the form of a Lotus 1-2-3 spreadsheet on disk.[37] All that was required to use the formula was to insert the total amount to be distributed in the proper cell, and, automatically, each state's share was computed. The spreadsheet also provided empty columns where state-by-state values for additional factors could be inserted for automatic averaging with the original factors to generate a revised allocation. We cannot imagine a simpler process. Obviously, if the Court or the states selected a less global version of the equitable allocation formula, such as broker-by-broker allocation in accordance with the geographical distribution of each broker's customers or transactions, the administrative burden would increase. But again, such an option would be selected only if the significant additional burdens were justified by commensurate improvements in equity.

5. The Master asked what would happen if a state subsequently discovered that it was the last known address of a missing owner of excess receipts. This is the kind of detail which the states would presumably agree upon in proposing a final decree, but the position of the proponents is that, since each state has already received an aliquot share of all the items, any discrete item can be presumed to have gone to the proper state as part of that share, so that no further adjustment would be necessary.

6. How often should the formula be updated? Again

---

[37] A copy of the disk was sent to each person on the Master's service list, including the Clerk of the Court. Although the Clerk returned his copy, we assume that the Master's copy is included in the materials transmitted to the Court, and we are lodging another copy with the Court for the Court's convenience. It is designated "Attachment 1" to our filed Exceptions.

this is the kind of issue that should be left for the states to address jointly. Retrospectively, a single formula based on past statistics could cover all past excess funds. Prospectively, the states could either agree on a convenient update interval (such as every 5 or 10 years), or they might, through the Uniform Laws process, agree to gather the type of information on state-by-state investment activity that would allow more frequent updates.[38]

7. The Master's final concern is that the equitable allocation approach may not be that much fairer than the Master's approach. Because we agree that the difference may not be substantial, and because we believe that both the Master's and our approaches are much fairer than New York's, Delaware's, or Texas/Alabama's, we have not contested that question, and remain satisfied with the Master's result. In favor of the Master's result is the clear elimination of the Delaware bias, and the likelihood that each state has one or more headquarters of publicly traded corporations. The equitable allocation approach also eliminates the Delaware tilt, and assures every state of a reasonable share of the funds at issue regardless of the happenstance of headquarters. Moreover, because it is the states where investors are located that police, through their broker registration and securities agency enforcement activities, the broker-customer relationships and transactions that most immediately give rise to the unclaimed property here, the state "benefit" criterion is clearly met by this approach as well. *See* Final Brief of the Designated States in Support of Their Dispositive Motion and in Opposition to the Other States' Dispositive Motions, No. 111 Orig., at 6-7, Appendix D-E (January 30, 1990); *Texas v. New Jersey*, 379 U.S. at 680.

---

[38] *See* note 27, *supra*.

CONCLUSION

The equity and convenience of the Master's result enable the Court to adopt it directly without going through what Justice Powell called the "Cinderella-like compulsion" of squeezing this large foot into the tiny slipper of the old backup rule. 407 U.S. at 222 (Powell, J., dissenting). In the alternative, a result at least as fair and convenient can be achieved by adopting the equitable allocation approach, and directing the states, with the assistance of the Master, to agree upon a final decree implementing that approach in the most convenient way that achieves a rough approximation of the relative investment activity of each state's citizens.

Respectfully submitted,

John Payton
Corporation Counsel
Charles L. Reischel
Deputy Corporation
Counsel
Lutz Alexander Prager
Assistant Deputy
Corporation Counsel
District Building,
Room 305
Washington, D.C. 20004

Attorneys for the District
of Columbia

Don Stenberg
Attorney General
Dale A. Comer
Assistant Attorney
General
2115 State Capitol
Lincoln, NE 68509

Attorneys for the State
of Nebraska

James F. Flug*
Lee E. Helfrich
Martin Lobel
Lobel, Novins, Lamont &
Flug
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of
Michigan,
Frank J. Kelly,
Attorney General, and
Maryland,
J. Joseph Curran, Jr.
Attorney General

* Counsel Of Record

APPENDIX A

ATTACHMENT A
DESIGNATED STATES'
ALLOCATION SPREADSHEET

<<< Amount to be
Divided Among States

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$0.00	ALAB	1.00	807	0.94
$0.00	ALAS	0.20	135	0.16
$0.00	ARIZ	1.35	1,232	1.43
$0.00	ARK	0.75	490	0.57
$0.00	CAL	11.45	10,639	12.35
$0.00	COLO	1.58	1,434	1.67
$0.00	CONN	1.76	1,493	1.73
$0.00	DEL	0.29	212	0.25
$0.00	DC	0.73	965	1.12
$0.00	FLA	6.27	6,137	7.13
$0.00	GA	2.15	2,022	2.35
$0.00	HI	0.41	288	0.33
$0.00	IDAH	0.32	176	0.20
$0.00	ILL	5.33	4,191	4.87
$0.00	IND	1.67	937	1.09
$0.00	IOWA	1.06	505	0.59
$0.00	KAN	0.80	407	0.47
$0.00	KY	0.93	581	0.67
$0.00	LA	1.17	835	0.97
$0.00	MAINE	0.33	193	0.22
$0.00	MD	1.54	1,130	1.31
$0.00	MASS	2.87	2,949	3.42
$0.00	MICH	3.52	2,594	3.01
$0.00	MINN	1.53	1,204	1.40
$0.00	MSSPI	0.46	274	0.32
$0.00	MSSRI	2.30	2,018	2.34
$0.00	MONT	0.33	155	0.18
$0.00	NEB	0.67	437	0.51
$0.00	NEV	0.37	283	0.33
$0.00	NH	0.35	206	0.24

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.) IV %	Factor V (abs.) V %
1.00%	72	1.08	0	0
0.30%	10	0.15	0	0
1.20%	96	1.43	0	0
0.60%	72	1.08	0	0
12.70%	623	9.31	0	0
1.40%	112	1.67	0	0
2.00%	104	1.55	0	0
0.30%	21	0.31	0	0
0.50%	38	0.57	0	0
4.90%	455	6.80	0	0
1.90%	148	2.21	0	0
0.60%	19	0.28	0	0
0.30%	31	0.46	0	0
5.80%	356	5.32	0	0
1.80%	142	2.12	0	0
1.00%	107	1.60	0	0
0.80%	76	1.14	0	0
0.90%	81	1.21	0	0
1.30%	84	1.26	0	0
0.40%	24	0.36	0	0
2.10%	81	1.21	0	0
3.10%	140	2.09	0	0
3.90%	245	3.66	0	0
1.60%	107	1.60	0	0
0.50%	38	0.57	0	0
1.90%	178	2.66	0	0
0.30%	34	0.51	0	0
0.60%	61	0.91	0	0
0.40%	26	0.39	0	0
0.40%	27	0.40	0	0

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$0.00	NJ	3.35	3,022	3.51
$0.00	NM	0.49	322	0.37
$0.00	NY	12.74	15,562	18.07
$0.00	NC	2.36	1,540	1.79
$0.00	ND	0.25	140	0.16
$0.00	OHIO	4.05	2,719	3.16
$0.00	OKLA	1.17	786	0.91
$0.00	ORE	1.06	904	1.05
$0.00	PENN	4.23	3,472	4.03
$0.00	RI	0.32	257	0.30
$0.00	SC	1.00	629	0.73
$0.00	SD	0.25	150	0.17
$0.00	TENN	1.43	1,193	1.39
$0.00	TEX	6.57	5,385	6.25
$0.00	UTAH	0.52	441	0.51
$0.00	VA	2.08	1,482	1.72
$0.00	VT	0.20	139	0.16
$0.00	WASH	1.88	1,547	1.80
$0.00	WV	0.48	274	0.32
$0.00	WISC	1.88	1,160	1.35
$0.00	WYOM	0.18	68	0.08
TOTALS:				
$0.00		100%	86,121	100%

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.) IV	%	Factor V (abs.) V	%
4.00%	171	2.56	0		0	
0.40%	47	0.70	0		0	
11.10%	607	9.07	0		0	
1.90%	227	3.39	0		0	
0.20%	25	0.37	0		0	
4.40%	308	4.60	0		0	
1.10%	101	1.51	0		0	
0.90%	83	1.24	0		0	
4.90%	251	3.75	0		0	
0.40%	18	0.27	0		0	
0.90%	91	1.36	0		0	
0.20%	25	0.37	0		0	
1.40%	101	1.51	0		0	
6.20%	486	7.26	0		0	
0.60%	31	0.46	0		0	
2.30%	148	2.21	0		0	
0.20%	15	0.22	0		0	
1.90%	130	1.94	0		0	
0.60%	34	0.51	0		0	
1.80%	166	2.48	0		0	
0.20%	17	0.25	0		0	
100.10%	6690	100%	0	0%	0	0%

ATTACHMENT A
ALLOCATION SPREADSHEET
APPLIED TO $100,000,000 FUND

$100,000,000.00 <<< Amount to be Divided Among States

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$1,004,094.26	ALAB	1.00	807	0.94
$202,010.34	ALAS	0.20	135	0.16
$1,354,722.75	ARIZ	1.35	1,232	1.43
$748,150.65	ARK	0.75	490	0.57
$11,451,501.38	CAL	11.45	10,639	12.35
$1,579,220.13	COLO	1.58	1,434	1.67
$1,762,134.76	CONN	1.76	1,493	1.73
$286,593.34	DEL	0.29	212	0.25
$729,266.39	DC	0.73	965	1.12
$6,273,647.51	FLA	6.27	6,137	7.13
$2,152,654.62	GA	2.15	2,022	2.35
$406,004.39	HI	0.41	288	0.33
$322,473.11	IDAH	0.32	176	0.20
$5,327,485.53	ILL	5.33	4,191	4.87
$1,669,635.15	IND	1.67	937	1.09
$1,061,574.93	IOWA	1.06	505	0.59
$802,604.07	KAN	0.80	407	0.47
$928,155.46	KY	0.93	581	0.67
$1,174,665.60	LA	1.17	835	0.97
$327,506.73	MAINE	0.33	193	0.22
$1,540,443.09	MD	1.54	1,130	1.31
$2,871,352.07	MASS	2.87	2,949	3.42
$3,523,566.66	MICH	3.52	2,594	3.01
$1,531,967.71	MINN	1.53	1,204	1.40
$461,902.36	MSSPI	0.46	274	0.32
$2,300,533.95	MSSRI	2.30	2,018	2.34
$329,290.42	MONT	0.33	155	0.18
$672,853.80	NEB	0.67	437	0.51
$372,291.63	NEV	0.37	283	0.33
$347,479.43	NH	0.35	206	0.24

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.) IV %	Factor V (abs.) V %
1.00%	72	1.08	0	0
0.30%	10	0.15	0	0
1.20%	96	1.43	0	0
0.60%	72	1.08	0	0
12.70%	623	9.31	0	0
1.40%	112	1.67	0	0
2.00%	104	1.55	0	0
0.30%	21	0.31	0	0
0.50%	38	0.57	0	0
4.90%	455	6.80	0	0
1.90%	148	2.21	0	0
0.60%	19	0.28	0	0
0.30%	31	0.46	0	0
5.80%	356	5.32	0	0
1.80%	142	2.12	0	0
1.00%	107	1.60	0	0
0.80%	76	1.14	0	0
0.90%	81	1.21	0	0
1.30%	84	1.26	0	0
0.40%	24	0.36	0	0
2.10%	81	1.21	0	0
3.10%	140	2.09	0	0
3.90%	245	3.66	0	0
1.60%	107	1.60	0	0
0.50%	38	0.57	0	0
1.90%	178	2.66	0	0
0.30%	34	0.51	0	0
0.60%	61	0.91	0	0
0.40%	26	0.39	0	0
0.40%	27	0.40	0	0

State Share	STATE	Avg%	Reg.Reps. 1987	I %
$3,353,905.43	NJ	3.35	3,022	3.51
$491,980.56	NM	0.49	322	0.37
$12,743,475.02	NY	12.74	15.562	18.07
$2,359,648.72	NC	2.36	1,540	1.79
$245,336.24	ND	0.25	140	0.16
$4,052,339.96	OHIO	4.05	2,719	3.16
$1,173,737.21	OKLA	1.17	786	0.91
$1,063,093.50	ORE	1.06	904	1.05
$4,226,393.03	PENN	4.23	3,472	4.03
$322,384.42	RI	0.32	257	0.30
$996,536.79	SC	1.00	629	0.73
$249,205.47	SD	0.25	150	0.17
$1,431,181.70	TENN	1.43	1,193	1.39
$6,570,278.01	TEX	6.57	5,385	6.25
$524,974.48	UTAH	0.52	441	0.51
$2,077,004.91	VA	2.08	1,482	1.72
$195,140.31	VT	0.20	139	0.16
$1,879,209.81	WASH	1.88	1,547	1.80
$475,300.98	WV	0.48	274	0.32
$1,875,460.68	WISC	1.88	1,160	1.35
$177,630.55	WYOM	0.18	68	0.08
TOTALS:				
$100,000,000.00		100%	86,121	100%

II Shrhldrs. 1983	Branches 1987	III %	Factor IV (abs.)	IV %	Factor V (abs.)	V %
4.00%	171	2.56		0		0
0.40%	47	0.70		0		0
11.10%	607	9.07		0		0
1.90%	227	3.39		0		0
0.20%	25	0.37		0		0
4.40%	308	4.60		0		0
1.10%	101	1.51		0		0
0.90%	83	1.24		0		0
4.90%	251	3.75		0		0
0.40%	18	0.27		0		0
0.90%	91	1.36		0		0
0.20%	25	0.37		0		0
1.40%	101	1.51		0		0
6.20%	486	7.26		0		0
0.60%	31	0.46		0		0
2.30%	148	2.21		0		0
0.20%	15	0.22		0		0
1.90%	130	1.94		0		0
0.60%	34	0.51		0		0
1.80%	166	2.48		0		0
0.20%	17	0.25		0		0
100.10%	6690	100%	0	0%	0	0%

ATTACHMENT A
DESIGNATED STATES' ALLOCATION SPREADSHEET

INSTRUCTIONS FOR USE OF STATE ALLOCATION SPREADSHEET ON DISK

To allocate a given fund:

With 1-2-3 running, retrieve "DELNY.wk1". Insert total amount to be allocated in cell A1 (use no commas or $). State allocations will appear in cells A5-A55.

To add a new series:

Insert new data in cells I5-I55 ("Factor IV (abs.)") if in absolute form, or in cells J5-J55 ("IV %") if in percentage form. (For a second new series use columns K or L.)

New series will be averaged in with old ones automatically.

No. 111 Original (44)

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

STATEMENT OF THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA AND THE STATE OF CALIFORNIA IN SUPPORT OF THE REPORT OF THE SPECIAL MASTER

DANIEL E. LUNGREN
Attorney General of California
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for Plaintiff-Intervenor State of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
JUDITH E. SCHAEFFER
LESLIE R. COHEN
DAN SCHWEITZER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

May 26, 1992

[Attorneys General of Alabama, *et al.* Listed Inside]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

ATTORNEYS GENERAL OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, *ET AL.*

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

CHRIS GORMAN
Attorney General of Kentucky
700 Capitol Avenue
Capitol Building, Suite 116
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
2-3-4 Loyola Building
New Orleans, Louisiana 70112
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

BEST AVAILABLE COPY

WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN112
Trenton, New Jersey 08625
(609) 292-4925

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARIO J. PALUMBO
Attorney General of West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 348-2021

MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

JOHN P. ARNOLD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301-
6397
(603) 271-3658

NICHOLAS J. SPAETH
Attorney General of
North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General of Washington
Highways-Licenses Building,
PB71
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

STATEMENT OF THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA AND THE STATE OF CALIFORNIA IN SUPPORT OF THE REPORT OF THE SPECIAL MASTER

This original jurisdiction action involves a controversy among the several States over entitlement to custodial possession of unclaimed dividends, interest and other

distributions paid by issuers on securities and held for the beneficial owners of such securities by intermediaries such as brokerage firms, banks and depositories when there is no known identity and/or address of the beneficial owner.

The State of Delaware commenced this action in 1988 by filing suit against the State of New York, which to date has taken possession of virtually all the disputed property or has asserted the right to do so. On December 12, 1988, the Court appointed Thomas H. Jackson as Special Master. Subsequently, the remaining 48 States and the District of Columbia intervened or sought leave to intervene as plaintiffs.

Following extensive discovery concerning the structural flow of securities distributions, four rounds of briefing, oral argument, comments submitted by the parties to a 76-page draft Report circulated by the Special Master that included 14 pages of detailed factual findings and a three-page Proposed Decree, and two supplemental rounds of briefing, the Special Master on January 28, 1992 submitted his Report to the Court.

The Report concludes that (i) when there is no known identity and/or address of the beneficial owner of an unclaimed securities distribution, the State entitled to custodial possession of such distribution is the State in which the issuer of the security is located; (ii) the State of such issuer should be defined as the State of its "principal executive offices" as set forth in filings required by the Securities and Exchange Commission;[1] and (iii) the decision should be applied to all disputed property taken by New York.

---

[1] When the issuer is a governmental entity, the Report concludes that the State of the governmental entity is entitled to custodial possession of the property.

Each party was given a full opportunity to set forth in great detail the factual and legal bases of its position. The Special Master's recommendations reflect an extraordinarily careful evaluation of the parties' respective submissions, the relevant facts and the controlling legal and equitable principles. These recommendations are supported by 44 States, including three States (California, Ohio and Rhode Island) that supported an alternative position before the Special Master. The 31 undersigned plaintiff-intervenor States take no exception to the Report, support it fully, and respectfully request this Court to adopt its recommendations. In accordance with this Court's briefing schedule, the undersigned States intend to file a Reply Brief on or before July 27 responding to such Exceptions as may be filed by other parties.

Dated: May 26, 1992

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General of
California
RODERICK E. WALSTON
Chief Assistant Attorney
General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney
General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for
Plaintiff-Intervenor State
of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
JUDITH E. SCHAEFFER
LESLIE R. COHEN
DAN SCHWEITZER
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for
Plaintiff-Intervenor States
of Alabama, et al.

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

CHRIS GORMAN
Attorney General of Kentucky
700 Capitol Avenue
Capitol Building, Suite 116
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
2-3-4 Loyola Building
New Orleans, Louisiana 70112
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

JOHN P. ARNOLD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301-
6397
(603) 271-3658

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN112
Trenton, New Jersey 08625
(609) 292-4925

NICHOLAS J. SPAETH
Attorney General of
North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

KENNETH O. EIKENBERRY
Attorney General of Washington
Highways-Licenses Building,
PB71
Olympia, Washington 98504
(206) 753-6200

MARIO J. PALUMBO
Attorney General of West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 348-2021

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF DELAWARE,
Plaintiff,
and
STATE OF TEXAS,
Intervening Plaintiff,
v.
STATE OF NEW YORK,
Defendant.

On Exceptions to the Special Master's Report

EXCEPTIONS AND BRIEF IN SUPPORT FOR PLAINTIFF, STATE OF DELAWARE

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Plaintiff,
State of Delaware

May 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

EXCEPTIONS

TABLE OF CONTENTS

		Page
1.	Equation of "Issuer" with "Debtor"	E-3
2.	Substitution of "State of Principal Executive Office" for "State of Incorporation"	E-4
3.	Erroneous Findings of Fact or Failures to Find	E-5
4.	Denial of Discovery	E-7
5.	Retroactivity	E-7
6.	Failure to Recommend Alternative Conclusion	E-8

TABLE OF AUTHORITIES

Cases:

Hilton v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560 (1991) E-5
Pennsylvania v. *New York*, 407 U.S. 206 (1972) ..... *passim*
Texas v. *New Jersey*, 379 U.S. 674 (1965) ..... *passim*
Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980) E-5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 111 Original

STATE OF DELAWARE,

and *Plaintiff,*

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

EXCEPTIONS OF PLAINTIFF, STATE OF DELAWARE, TO THE REPORT OF THE SPECIAL MASTER

Delaware commenced this action in 1988 to recover money and other intangible property wrongfully escheated by the State of New York; Delaware's claims are based on this Court's decisions in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972).

In *Texas* v. *New Jersey*, this Court established a "clear" rule designed to settle "once and for all" the competing claims of states to escheat intangible property. 379 U.S. at 678. The Court held that unclaimed intangible property is subject to escheat "only by the state of the last known address of the creditor, as shown by the debtor's books and records." 379 U.S. at 681-82. Where there is

no record of an owner or address ("owner/address unknown"), or where the last known address is in a state that does not provide for escheat of the property, the Court held that a "backup rule" applies: the state of the debtor's corporate domicile (determined by its state of incorporation) was to have the right to escheat. 379 U.S. at 682; Decree, 380 U.S. at 518. In *Pennsylvania* v. *New York*, the Court declined to depart from the rule of *Texas* v. *New Jersey*, 407 U.S. at 210, 213-16.

The property at issue in this case consists of dividends, interest, and other distributions in respect of securities (generally, "distributions") held by securities brokers and other recordholders holding securities for the accounts of beneficial owners after those distributions have been paid by the issuers of the securities to the holders of record. Under universally-accepted doctrines of corporation and commercial law—identical in all material respects in every state in the Union—once these distributions are paid to the record owners, the issuers no longer have any right, title or interest in them and are discharged from liability with respect to them.

For many years, New York has collected these distributions from brokers and other similar parties having offices in New York. Delaware disputes New York's right to do so in certain cases, saying that where the property is "owner/address unknown" and is held by brokers that are Delaware corporations, it should be escheated to Delaware under the rule of *Texas* v. *New Jersey*. New York's position—rejected by the Special Master—is that property that appears to be "owner/address unknown" actually is not, since all the unknown owners are "statistically" presumed by New York to be "other brokers" with "trading addresses" in New York.

Starting in January 1989, and through March 1992, forty-eight additional states and the District of Columbia appeared in this action and moved to intervene. Most of the intervening plaintiffs argued for an inter-

pretation of "debtor" that viewed the recordholders of the securities—and thus the parties holding the unclaimed funds—as "transparent" and without legal relevance, so that the *issuer*, rather than the recordholder and holder of the funds—should always be deemed to be the "debtor" under *Texas* v. *New Jersey*. Those intervening states did not seek to overturn the rule that in "owner/address unknown" cases, the state of incorporation of the "debtor" (as they construed "debtor") was to be considered the debtor's domicile. A smaller group of states, led by California, argued for a more radical "interpretation"—actually, an overruling—of *Texas* v. *New Jersey*.

All these theories were directed to the "backup rule." The intervening plaintiffs sought to expand the scope of the case beyond the property sought by Delaware in its complaint—to all of the distributions seized by New York other than those which had flowed from New York-incorporated issuers, apart from "owner/address *known*" abandoned distributions. But no state sought to argue that the case be expanded to cover "owner/address *known*" unclaimed or abandoned distributions or securities or that the "primary rule" applicable to them should be changed.

Motions for judgment on the pleadings were referred to the Master, who has filed a report (the "Report") recommending that: (1) the term "debtor" should be interpreted to mean the issuer of the particular security on which distributions have been paid, rather than the holder of the distributions in question; and (2) the backup rule should be changed, so that a corporation's "principal executive office," rather than its state of incorporation, will be considered its domicile.

Delaware excepts to the Report as follows:

1. *Equation of "Issuer" with "Debtor."*—The Report misinterprets *Texas* v. *New Jersey* and *Pennsylvania* v. *New York* by asserting that in formulating its rules of priority the Court used the terms "debtor" and "creditor"

merely as "an attempt to identify the relevant parties" rather than as a "prescriptive legal command[]." Report 29. Delaware submits that the Report's recommendation in this regard does not comport with the ordinary meaning of the words "debtor" and "creditor," is inconsistent with universally-accepted state and common law and with the principles underlying the *Texas* rule, and changes the law in an area where the law should be settled.

All parties agree that under relevant state law (in all 50 states and the District of Columbia), once an issuer has made a distribution to a nominee (or other) record owner of the security, the *issuer* no longer has any right or interest in the distribution; and that by paying the recordholder the issuer has discharged its obligation and is no longer a "debtor" as that term is commonly understood (one who owes something to another). All parties agree that since the non-record beneficial owner may not look to the issuer for payment, such an owner is not a "creditor" of the issuer, only of the nominee. In the ordinary meaning of the words, the nominee in whose hands the funds have become "owner/address unknown" is a "debtor"—it owes the distribution to the beneficial owner, who either is unknown or unlocatable. The Master, however, recommended that the word "debtor" be construed in accordance with "federal common law" and discovered that under "federal common law" the issuer was the "debtor," although it did not have that status under the law of any of the 50 states. To this finding and conclusion, Delaware excepts.

2. *Substitution of "State of Principal Executive Office" for "State of Incorporation."*—The Report also errs in recommending that the rule adopted in *Texas* v. *New Jersey* and adhered to in *Pennsylvania* v. *New York* be "modified" so that the debtor's domicile is no longer considered its state of incorporation, but instead the state of location of its principal executive office.

Delaware excepts to this recommendation. Departing from the rule of corporate domicile here would be in-

consistent not only with this Court's precedents, but with fundamental principles of jurisprudence defining the relationship between the sovereign and its corporate citizens and the power of the sovereign over unclaimed property—principles that have retained their vitality for hundreds of years. At bottom, the Report recommends that these historical and legal principles be cast away in favor of a system that—in the Master's view—is more "fair" because it spreads moneys among more parties.

Both recommendations violate the rule of *stare decisis*. This Court has explained that "[a] litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980). While a "compelling justification" must always be presented for that reconsideration, *stare decisis* has "added force" where Congress has had many years to correct a decision and where public and private parties have relied on the unmodified rule. *See Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 564 (1991).

3. *Erroneous Findings of Fact or Failures to Find.*—Delaware excepts to the Report's findings of fact as erroneous in the following respects:

First, a fundamental factual error permeates the Report: it misleadingly suggests that all so-called "intermediaries" are legally alike; it therefore treats recordholders as if they were paying agents, and ascribes no legal relevance to their status as record security holders. Indeed, the Report seeks to make "the intermediaries as 'transparent' as possible." Report 36.

Paying and transfer agents are agents of the issuer, and their relationship with the issuer is contractual; the issuer, by contract or common law principles of agency, has a claim to the funds in the hands of its paying agent that cannot be paid to their owner. In contrast, the recordholder is not the issuer's agent, and it has legal title to

the distributions. Moreover, its claims are superior to all but those of the beneficial owner; brokerage houses are not the agents of issuers, and the issuers may not look to them for recovery of distributions unclaimed by their beneficial owners.

Many of the Findings of Fact are contaminated by a glossing over of these important legal distinctions and by a failure to recognize the legal status and property rights of the recordholders. Delaware therefore takes exception to Findings 4, 7, 9, 13, 14, 15, 16, 17, 24, 25, 28, 34, 35, 36, 48, 49, 58, 69, and 72, and to "Metafacts" A, B, C, and D.

Moreover, the record establishes that stockbrokers keep the interest they earn on unclaimed intangible property and account for such property as an asset (with a concomitant liability to the unknown beneficial owner). *See* Brief, *infra* pp. 29-30 & n.34. The Report erroneously fails to make a finding to this effect.

Second, the Report erroneously concludes that the "location of the principal executive offices of an issuer is, in almost all cases, ascertainable from standard sources." Report B-24 ("Metafact" G). As demonstrated in Delaware's submissions to the Master,[1] the location of a "principal executive office" is a factual question that requires a careful review of the relevant facts (often including the testimony of witnesses) and must be determined case by case. In its submissions to the Special Master, Delaware identified 94 companies that—according to two computer databases with data taken directly from SEC disclosure statements—had more than one principal executive office reported during the same period of time; that number more than doubled when other standard reference sources were also compared; and Delaware identified 785

---

[1] Letter from Richard L. Sutton to Thomas H. Jackson (Aug. 13, 1991) at 6-11; Supplemental Brief of Delaware (Nov. 4, 1991) at 5-21 and Appendix thereto; Affidavit of Jeffrey Bossert Clark (Nov. 4, 1991) and Exhibits thereto.

companies that changed principal executive offices in the years 1988 to 1991, according to public reference sources. If the "state of principal executive office" test is to be substituted for the "state of incorporation" test with respect to corporations that are not issuers of securities, the Master's finding, of course, breaks down even more seriously. In any event, Delaware excepts to this finding.

4. *Denial of Discovery.*—The Report erred in concluding that no discovery was needed to determine the consequences of the new rule substituting the "state of incorporation." Delaware excepts to the Master's failure to grant its request for discovery, made after the Master circulated a "Draft Report" indicating his disposition to recommend this rule change. The Master considered such discovery "pointless." Discovery Order No. 15 (Jan. 28, 1992) at 1. The Master did not pause to consider whether evidence should be received on the subjects of: how the listing of a "principal executive office" with the SEC bears any rational relationship to the commercial activity of the issuer and its subsidiaries; the proper treatment of unregistered issuers (such as federally-chartered organizations); the comparative practical burdens of and justifications for a "state of incorporation" and for a "principal executive office" test; the reliance of the states on the existing rule and the dislocation that would be caused by changing it; or how his recommendation to overturn *Texas* v. *New Jersey* would affect cases where the entity holding unclaimed intangible property does not list *any* principal executive office with the SEC, including the feasibility of applying the "principal executive office" test outside of the context of issuers of securities.

5. *Retroactivity.*—The Report errs in apparently applying all aspects of its recommendations retroactively. In his Draft Report, the Master stated:

> If the backup rule is modified, such as by substituting a chief executive office test for the existing state of incorporation test, I believe that the rule could be applied without difficulty, in this case, to the funds held by intermediaries, not yet possessed by any state. On the other hand, such a change in a rule should not upset funds already escheated, in other cases (or circumstances), in reliance on the backup rule as it currently exists, with a jurisdiction of incorporation test. Thus, I would have any change in the backup rule be non-retroactive to that extent.

Draft Report 57 n.64.[2] Yet the final report contains no language comparable to that quoted from the Draft Report and appears to contemplate a complete retroactivity of the new rules (whether admittedly new or unadmittedly so) that it recommends. Retroactivity would unjustly fall on Delaware which has relied on the backup rule to escheat unclaimed property in the hands of its corporate citizens. Were the Court to agree that the rules are to be changed as recommended by the Master, Delaware takes exception to any such retroactivity.

6. *Failure to Recommend Alternative Conclusion.*— The Report errs in failing to conclude expressly that, if (contrary to the Master's recommendation) the brokers are held to be "debtors" and the traditional rule of corporate domicile under *Texas* v. *New Jersey* is applied, Delaware is entitled to recovery from New York in accordance with its Complaint. This conclusion is implicit in the Report's correct rejection of New York's position, and Delaware excepts to the failure of the Report to recommend a specific conclusion to this effect and asks this Court so to conclude.

---

[2] Indeed, all but the Texas subgroup agreed. Supplemental Submission of Alabama, *et al.* (Nov. 4, 1991) at 29 n.19; Supplemental Reply Submission of California, *et al.* (Nov. 21, 1991) at 18-19.

In support of the foregoing exceptions, Delaware submits the attached Brief.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Plaintiff,
State of Delaware

May 1992

BRIEF IN SUPPORT OF EXCEPTIONS
FOR PLAINTIFF, STATE OF DELAWARE

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
JURISDICTION	1
CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS	1
STATEMENT	2
1. The Rule of *Texas* v. *New Jersey*	2
2. *Pennsylvania* v. *New York (Western Union)*	6
3. *Delaware* v. *New York*	9
4. Reference to the Master	20
5. The Master's Report and Recommendation	22
SUMMARY OF ARGUMENT	23
ARGUMENT	27
I. THE COURT SHOULD ACCEPT NEITHER THE MASTER'S UNACKNOWLEDGED CHANGE TO THE BACKUP RULE—THAT "ISSUER" BE SUBSTITUTED FOR "DEBTOR"—NOR HIS ACKNOWLEDGED CHANGE—THAT "STATE OF PRINCIPAL EXECUTIVE OFFICE" BE SUBSTITUTED FOR "STATE OF INCORPORATION"	27
A. In the Circumstances Involved in This Case, the "Issuer" Is Not a "Debtor" with Respect to the Dividends and Interest Under State Law, and Should Not Be Regarded as a "Debtor" by This Court for Purposes of Escheat	28

TABLE OF CONTENTS—Continued

Page

1. The "Issuer as Debtor" Recommendation Violates the Rule of *Texas* v. *New Jersey* and Contravenes the Legal Underpinnings of the Doctrine of Escheat 31
2. The Report's Justifications for Its Departure from Ordinary Law and Practice Are Without Substance 37
3. The "Issuer as Debtor" Recommendation Improperly Ignores State Law 45
4. "Fairness" as a "Tie-Breaker" 49

B. The Master's Recommended "Modification" of the Backup Rule to Replace the State of Incorporation with the State of Principal Executive Office Must Be Rejected 52

1. Intervening Developments in the Law Fully Comport with *Texas* v. *New Jersey*'s Corporate Domicile Rule 53
2. Discarding the Rule of Corporate Domicile Would Be an Administrative Disaster 56
3. Fairness Demands Retention, Not Rejection, of the Corporate Domicile Rule 61
   (a) The State of Incorporation Provides Significant Benefits to Shareholders.. 62
   (b) The State of "Principal Executive Office" Bears No Particular Relationship in Law or Economics to Stockholder Welfare 64
   (c) The Master's View of "Fairness" is Misguided 68

C. The Master's Recommendations, Both as to the "State of Incorporation" and the "Debtor as Issuer" Points, Violate This Court's Teachings on the Principles of *Stare Decisis* 70

TABLE OF CONTENTS—Continued

Page

II. IF CHANGES TO THE *TEXAS* RULE ARE TO BE MADE, THEY SHOULD NOT BE APPLIED RETROACTIVELY AGAINST DELAWARE 76

III. JUDGMENT SHOULD BE ENTERED IN FAVOR OF DELAWARE AND AGAINST NEW YORK 83

CONCLUSION 86

TABLE OF AUTHORITIES

Cases:

	Page
Aetna Life Ins. Co. v. *Borges*, 869 F.2d 142 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989)	9
Amanda Acquisition Corp. v. *Universal Foods Corp.*, 877 F.2d 496 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989)	55
American Trucking Ass'ns v. *Smith*, 496 U.S. 167 (1990)	77, 78, 79, 81, 82
Anderson Nat'l Bank v. *Luckett*, 321 U.S. 233 (1944)	4, 34
Appleby v. *City of New York*, 271 U.S. 364 (1926)	47-48
Arkansas Dep't of Fin. & Admin. v. *City of N. Little Rock*, 659 S.W.2d 937 (Ark. 1983)	9
In re Astrocade, Inc., 31 B.R. 245 (Bankr. S.D. Ohio 1983)	58
Barnhill v. *Johnson*, 112 S. Ct. 1386 (1992)	48
Block v. *North Dakota*, 461 U.S. 273 (1983)	82
BNS Inc. v. *Koppers Co.*, 683 F. Supp. 458 (D. Del. 1988)	63
Board of County Comm'rs v. *United States*, 308 U.S. 343 (1939)	48
Board of Regents v. *Roth*, 408 U.S. 564 (1972)	47
Burks v. *Lasker*, 441 U.S. 471 (1979)	55
Burnet v. *Coronado Oil & Gas Co.*, 285 U.S. 393 (1932)	70
Business Roundtable v. *SEC*, 905 F.2d 406 (D.C. Cir. 1990)	55
Callaway v. *Benton*, 336 U.S. 132 (1949)	49
Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971)	79, 80
Cipriano v. *City of Houma*, 395 U.S. 701 (1969)	81
Connecticut v. *Massachusetts*, 282 U.S. 660 (1931)	46, 49
Connecticut Mut. Life Ins. Co. v. *Moore*, 333 U.S. 541 (1948)	*passim*
Cooper v. *Citizens Nat'l Bank*, 267 S.W.2d 848 (Tex. Ct. App. 1954)	39
Cort v. *Ash*, 422 U.S. 66 (1975)	55
Cory v. *Public Utils. Comm'n*, 658 P.2d 749 (Cal. 1983)	9
CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69 (1987)	54, 55

TABLE OF AUTHORITIES—Continued

	Page
Davies Warehouse Co. v. *Bowles*, 321 U.S. 144 (1944)	49
De Anda v. *De Anda*, 662 S.W.2d 107 (Tex. Ct. App. 1983)	39
In re DePew's Estate, 41 N.Y.S.2d 19 (Surr. Ct. 1943)	39
Edelman v. *Jordan*, 415 U.S. 651 (1974)	71
Employers Ins. v. *Smith*, 453 N.W.2d 856 (Wis. 1990)	9
In re Ericson, 6 B.R. 1002 (D. Minn. 1980)	58
Federal Base Ball Club v. *National League*, 259 U.S. 200 (1922)	71
Flood v. *Kuhn*, 407 U.S. 258 (1972)	71, 73, 74
Ford v. *Ford*, 371 U.S. 187 (1962)	48
Friar v. *Vanguard Holding Corp.*, 509 N.Y.S.2d 374 (N.Y. App. Div. 1986)	9
Garcia v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985)	49
Garvy v. *Blatchford Calf Meal Co.*, 119 F.2d 973 (7th Cir. 1941)	39
In re Golf Course Builders Leasing, Inc., 768 F.2d 1167 (10th Cir. 1985)	58
Hilton v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560 (1991)	70, 71, 73, 74
Huntington v. *Attrill*, 146 U.S. 657 (1892)	37
Illinois v. *Kentucky*, 111 S. Ct. 1877 (1991)	82
Illinois Brick Co. v. *Illinois*, 431 U.S. 720 (1977)	71
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945)	36
In re J.A. Thompson & Son, 665 F.2d 941 (9th Cir. 1982)	58
James B. Beam Distilling Co. v. *Georgia*, 111 S. Ct. 2439 (1991)	77, 78, 79, 81
Kamen v. *Kemper Fin. Servs.*, 111 S. Ct. 1711 (1991)	48
Late Corp. of the Church v. *United States*, 136 U.S. 1 (1890)	2, 34
Lemon v. *Kurtzman*, 411 U.S. 192 (1973)	81

TABLE OF AUTHORITIES—Continued

	Page
Louisiana Health Serv. & Indem. Co. v. *McNamara*, 561 So. 2d 712 (La. 1990)	9
Mellon Bank, N.A. v. *Metro Communications, Inc.*, 945 F.2d 635 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1476 (1992)	58, 61
In re Melrose Ave., 136 N.E. 235 (N.Y. 1922)	3
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. *North Eur. Oil Royalty Trust*, 490 A.2d 558 (Del. 1985)	16
Miller Bros. v. *Maryland*, 347 U.S. 340 (1954)	35
Milwaukee County v. *M.E. White Co.*, 296 U.S. 268 (1935)	36
Morgane v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970)	73
National Bellas Hess v. *Department of Revenue*, 386 U.S. 753 (1967)	35
National Geographic Soc'y v. *California Bd. of Equalization*, 430 U.S. 551 (1977)	35
In re Northeast Utils., 479 F. Supp. 194 (D. Conn. 1979)	10
O'Connor v. *Sperry & Hutchinson Co.*, 379 A.2d 1378 (Pa. Commw. Ct. 1977), *aff'd*, 412 A.2d 539 (Pa. 1980)	9
Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971)	36
Oregon ex rel. State Land Bd. v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977)	48
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	53, 70, 71, 75
Paul v. *Davis*, 424 U.S. 693 (1976)	47
Pennsylvania v. *New York*, 407 U.S. 206 (1972)	*passim*
In re Peregrine Entertainment, Ltd., 116 B.R. 194 (C.D. Cal. 1990)	57
Presley v. *City of Memphis*, 769 S.W.2d 221 (Tenn. Ct. App. 1988)	9
Revenue Cabinet v. *Blue Cross & Blue Shield of Ky.*, 702 S.W.2d 433 (Ky. 1986)	9
Riggs Nat'l Bank v. *District of Columbia*, 581 A.2d 1229 (D.C. 1990)	9

TABLE OF AUTHORITIES—Continued

	Page
RP Acquisition Corp. v. *Staley Continental, Inc.*, 686 F. Supp. 476 (D. Del. 1988)	63-64
Runyon v. *McCrary*, 427 U.S. 160 (1976)	75
Saint Francis College v. *Al-Khazraji*, 481 U.S. 604 (1987)	77
Sadler v. *NCR Corp.*, 928 F.2d 48 (2d Cir. 1991)	55
Santa Fe Indus. v. *Green*, 430 U.S. 462 (1977)	55
Security Sav. Bank v. *California*, 263 U.S. 282 (1923)	4, 54
Seierstad v. *Serwold*, 716 P.2d 885 (Wash. 1986)	9
Shaffer v. *Heitner*, 433 U.S. 186 (1977)	36
Society for Propagation of Gospel in Foreign Parts v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464 (1823)	2
South Carolina Tax Comm'n v. *Metropolitan Life Ins. Co.*, 221 S.E.2d 522 (S.C. 1975)	9
South Carolina Tax Comm'n v. *York Elec. Coop.*, 270 S.E.2d 626 (S.C. 1980)	9
Square D Co. v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)	71
Standard Oil Co. v. *New Jersey*, 341 U.S. 428 (1951)	2, 3, 54
State v. *Elsinore Shore Assocs.*, 592 A.2d 604 (N.J. Super. Ct. App. Div. 1991)	9
State v. *Liquidating Trustees of Republic Petroleum Co.*, 510 S.W.2d 311 (Tex. 1974)	10
State v. *New Jersey Nat'l Bank & Trust*, 298 A.2d 65 (N.J. 1972)	10
State Bd. of Ins. v. *Todd Shipyards*, 370 U.S. 451 (1962)	35
State Dep't of Revenue v. *Puget Sound Power & Light Co.*, 694 P.2d 7 (Wash. 1985)	9-10
State ex rel. Mallicoat v. *Coe*, 460 P.2d 357 (Or. 1969)	10
State ex rel. Marsh v. *Nebraska State Bd. of Agriculture*, 350 N.W.2d 535 (Neb. 1984)	9
Texas v. *New Jersey*, 379 U.S. 674 (1965)	*passim*
Toolson v. *New York Yankees, Inc.*, 346 U.S. 356 (1953)	71, 73

TABLE OF AUTHORITIES—Continued

	Page
Treasurer & Receiver General v. *John Hancock Mut. Life Ins. Co.*, 446 N.E.2d 1376 (Mass. 1983)	9
Trustees of Dartmouth College v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819)	54
Tyson Foods, Inc. v. *McReynolds*, 865 F.2d 99 (6th Cir. 1989)	55
United States v. *Estate of Donnelly*, 397 U.S. 286 (1970)	77
United States v. *Hutcheson*, 312 U.S. 219 (1941)	73
United States v. *Maine*, 420 U.S. 515 (1975)	74
United States v. *Mason*, 412 U.S. 391 (1973)	74
Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980)	70, 71
Welch v. *Texas Dep't of Highways & Pub. Transportation*, 483 U.S. 468 (1987)	70
Wallace v. *McConnell*, 38 U.S. (13 Pet.) 136 (1839)	74
Western Union Telegraph Co. v. *Pennsylvania*, 368 U.S. 71 (1961)	3, 4
Westinghouse Credit Corp. v. *Rovi Prop. & Mgt. Corp.*, 607 S.W.2d 682 (Ky. Ct. App. 1980)	58
Constitutions:	
United States Constitution	
art. I, § 8, cl. 3 (Commerce Clause)	1, 8
art. I, § 10, cl. 1 (Contract Clause)	48
art. III, § 2 (Original Jurisdiction)	1
art. IV, § 1 (Full Faith & Credit Clause)	1, 3, 8, 48
amend. XIV, § 1 (Due Process Clause)	*passim*
amend. XIV, § 5 (Enabling Clause)	1, 8
Del. Const. art. IX, § 1	63
Federal Statutes:	
Act to Hold a Parcel of Land in Trust for the Burns Paiute Tribe, Pub. L. No. 98-25, 97 Stat. 185 (1983)	72
25 U.S.C. § 373b	72

TABLE OF AUTHORITIES—Continued

	Page
Act Providing for the Disposition of Estates of Indians Dying Intestate without Heirs, Pub. L. No. 77-774, c. 640, 56 Stat. 1021 (1942)	72
25 U.S.C. §§ 373a	72
Act to Provide for Disposition of Chekalis Tribes Judgment Fund, Pub. L. No. 90-114, 81 Stat. 335 (1967)	72
25 U.S.C. § 1153	72
Act to Provide for Disposition of Duwamish Tribe Judgment Fund, Pub. L. No. 89-660, 80 Stat. 910 (1966)	72
25 U.S.C. § 1133	72
Act to Provide for Disposition of Estates of Intestate Members of Cherokee, Chickasaw, Choctaw and Seminole Nations of Oklahoma, Pub. L. No. 91-240, 84 Stat. 203 (1970)	72
25 U.S.C. § 375d	72
Act to Provide for Disposition of Loyal Creek Judgment Fund, Pub. L. No. 90-76, 81 Stat. 177 (1967)	72
25 U.S.C. § 788	72
Act to Provide for Disposition of Nooksack Tribe Judgment Fund, Pub. L. No. 89-656, 80 Stat. 906 (1966)	72
25 U.S.C. § 1103	72
Act to Provide for Disposition of Omaha Tribe Judgment Fund, Pub. L. No. 89-717, 80 Stat. 1114 (1966)	72
25 U.S.C. § 967b	72
Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (1974)	72
43 U.S.C. § 1606(h)(2)(A)	72
Armed Forces Code, Pub. L. No. 84-1028, c. 1041, 70A Stat. 1 (1956)	72
10 U.S.C. §§ 2571 to 2577	72

TABLE OF AUTHORITIES—Continued

	Page
Armed Forces Retirement Home Act of 1991, Pub. L. No. 101-510, Div. A., Title XV, 104 Stat. 1485 (1990)	71
24 U.S.C. § 420(e)	71-72
Disposition of Abandoned Money Orders and Traveler's Checks Act, Pub. L. No. 93-495, Title VI, 88 Stat. 1500, 1525 (1974)	1-2, 8, 58, 71
12 U.S.C. § 2501	1-2, 8
12 U.S.C. § 2503	58
Garn-St. Germain Depository Institutions Act of 1982, Pub. L. No. 97-320, 96 Stat. 1469 (1982)	72, 72-73
12 U.S.C. §§ 216 to 216d	72
12 U.S.C. § 484(b)	72-73
Government Organizations & Employees Code, Pub. L. No. 89-554, 80 Stat. 378 (1966)	72
5 U.S.C. § 8705(d)	72
Indian Land Consolidation Act, Pub. L. No. 97-459, 96 Stat. 2515 (1983)	72
25 U.S.C. § 2205	72
25 U.S.C. § 2206	72
Investment Company Act of 1940, Pub. L. No. 76-768, c. 686, 54 Stat. 789 (1940)	51
Section 17(a)(1), 15 U.S.C. § 80a-17(a)(1)	51
Judicial Code, Pub. L. No. 80-773, 62 Stat. 869 (1948)	65
28 U.S.C. § 1251(a)	1
28 U.S.C. § 1332	58, 59, 65
Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330 (1987)	72
26 U.S.C. § 6408	72
Postal Savings System Statute of Limitations Act, Pub. L. No. 98-359, 98 Stat. 402 (1984)	72
31 U.S.C. § 1322	72
Postal Savings System Unclaimed Deposits Act, Pub. L. No. 92-117, 85 Stat. 337 (1971) (formerly codified at 31 U.S.C. § 1322)	72

TABLE OF AUTHORITIES—Continued

	Page
Railroad Retirement Act of 1974, Pub. L. No. 93-445, 88 Stat. 1305 (1974)	72
45 U.S.C. § 231e(a)(5)	72
Railroad Retirement—Survivor Benefits Act of 1966, Pub. L. No. 89-700, 80 Stat. 1079 (1966)	72
45 U.S.C. § 352(g)	72
Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 905 (1934)	14, 44
Section 13(d), 15 U.S.C. § 78m(d)	14
Section 16(a), 15 U.S.C. § 78p(a)	14
Veterans Benefits Code, Pub. L. No. 85-857, 72 Stat. 1105 (1958)	72
38 U.S.C. § 1917(d)	72
38 U.S.C. § 1950	72
38 U.S.C. § 5502(e)	72
38 U.S.C. § 8504 to 8505	72
Veterans Compensation, Education & Employment Amendments of 1982, Pub. L. No. 97-306, 96 Stat. 1429 (1982)	72
38 U.S.C. § 1970(h)	72
State Statutes:	
Ala. Code § 10-2A-2(13) (1987)	38
Cal. Civ. Proc. Code § 1513 (West Supp. 1992)	18
Cal. Corp. Code § 185 (1990)	38
Del. Code Ann. tit. 8, § 203 (Cum. Supp. 1990)	13, 63
Ky. Rev. Stat. Ann. § 393.020 (Michie 1984)	2
Mich. Comp. Laws Ann. § 567.14 (West 1967)	2
N.Y. Aband. Prop. Law Arts. V & V-A (McKinney 1991)	2
§ 511	18, 30
N.C. Gen. Stat. § 116B-2 (1991)	2
Pennsylvania Takeover Act of 1990, Pa. Sen. Bill No. 1310 (codified in scattered sections of 15 Pa. Cons. Stat.)	64
Tex. Bus. Corp. Act Ann. art. 1.02(A)(15) (West 1980)	38
Wyo. Stat. § 9-5-202 (1977)	2

TABLE OF AUTHORITIES—Continued

Model Codes and Uniform Acts: Page

Model Business Corporation Act Ann. (3d ed. 1991) 2, 38, 41, 42
Section 1.40(21) 2
Section 2(f) 42
Section 7.07 ..... 2, 38
Official Comment to Section 7.07 38
Section 7.23 ..... 2, 41, 42
Official Comment to Section 7.23 42
Uniform Unclaimed Property Act (1981), 8A Uniform Laws Ann. 617 (1983 & Supp. 1991) .. 2, 10, 32
Section 1 2
Section 2 2
Section 3 ..... 2, 10
Official Comment to Section 3 32
Section 11 2
Section 12 2
Section 13 2
Section 17 2
Section 19 2
Section 20 2
Section 25 2
Section 26 2
Section 33 2
Uniform Disposition of Unclaimed Property Act (rev. 1966), 8A Uniform Laws Ann. 135 (1983 & Supp. 1991) 2, 10
Section 1 2
Section 5 2
Section 7 2
Section 9 2
Section 10 ..... 2, 10
Section 11 ..... 2, 10
Section 13 ..... 2, 10
Section 14 2
Uniform Commercial Code, 2-3 Uniform Laws Ann. (1981-1991) 2, 24, 38, 48, 56, 84
Section 8-207 ..... 2, 38, 39, 42
Section 9-103 56

TABLE OF AUTHORITIES—Continued

Page

Section 9-103(3) 56, 57
Section 9-103(6) 56
Official Comment 5(c) to Section 9-103 57
Section 9-105(1) 32

Rules:

Fed. R. App. P. 28(d) 30
Fed. R. Civ. P. 8(c) 39
Fed. R. Civ. P. 56(e) 85

Legislative Materials:

S. Rep. No. 505, 93d Cong., 1st Sess. (1973) 8
S. Rep. No. 1455, 73d Cong., 2d Sess. (1934) 16
Ronald Gilson, An Evaluation of Pennsylvania Senate Bill 1310 (on file with counsel of record) 69
Letter to the Governor and Members of the General Assembly of the Commonwealth of Pennsylvania from Forty-Two Professors (Jan. 26, 1990) (on file with counsel of record) 64
Delaware's Proposed Antitakeover Legislation: Hearing Before the House Judiciary Committee of the Delaware State Legislature (Jan. 20, 1988) 13

Administrative and Executive Materials:

Securities and Exchange Commission Rules and Forms

Form 10-K, 17 C.F.R. § 249.310 ..... 17, 59, 60, 61
Schedule 13D, 17 C.F.R. § 240.13d-101 14
Regulation 14A 42
14a-7, 17 C.F.R. § 240.14a-7 ..... 2, 43
14a-13, 17 C.F.R. § 240.14a-13 ..... 2, 43
14b-1, 17 C.F.R. § 240.14b-1 ..... 2, 43
14b-2, 17 C.F.R. § 240.14b-2 ..... 2, 43
Regulation 14C 42
14c-7, 17 C.F.R. § 240.14c-7 ..... 2, 43
Rule 15c3-2, 17 C.F.R. § 240.15c3-2 ..... 2, 44
Rule 15c3-3(e), 17 C.F.R. § 240.15c3-3(e) 2, 44, 45

TABLE OF AUTHORITIES—Continued

Page

Rule 15c3-3 (Exhibit A), 17 C.F.R. § 240.15c3-3a 2, 45

Rule 17Ad-8(b), 17 C.F.R. § 240.17Ad-8(b) ... 44

Board of Governors of Federal Reserve Sys., *Flow of Funds Accounts, Financial Assets and Liabilities, Fourth Quarter 1991* (March 12, 1992) .. 13, 14, 51

Division of Market Regulation, SEC, *Progress & Prospects: Depository Immobilization of Securities and Use of Book-Entry Systems* (June 14, 1985) 17

Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities (Dec. 3, 1976) 16, 17

Scholarly Authorities:

American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* (1986) 39

American Institute of CPAs, *Audits of Brokers & Dealers in Securities* (1973) 29

S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 Del. J. Corp. L. 1 (1976) 68

R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* (2d ed. 1991) 68

William W. Bartlett, *Mortgage Backed Securities* (1989) 51

Black's Law Dictionary (6th ed. 1990) 32

Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542 (1990) 69

J. Robert Brown, Jr., *The Shareholder Communication Rules and the SEC*, 13 J. Corp. L. 683 (1988) 15

Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921) 75

William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974) 62

TABLE OF AUTHORITIES—Continued

Page

Changes in the Model Business Corporation Act, 29 Bus. Law. 347 (1974) 42

Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913 (1982) 62

Ray H. Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 Ky. L.J. 302 (1947) 34

Egon Guttman, *Modern Securities Transfers* (3d ed. 1987 & Cum. Supp. 1991) 15, 18, 37, 40

Henry M. Hart & Herbert Wechsler, *The Federal Courts & The Federal System* (1953) 46-47

William D. Hawkland, *et al.*, *UCC Series* (1990) .. 15, 58

Charles R.P. Keating & Gail O'Gradney, *Fletcher Cyclopedia of the Law of Private Corporations* (1985 rev. ed.) 39

Kenneth G. Lore, *Mortgage Backed Securities* (1991 ed.) 51

Simon M. Lorne, *Acquisitions & Mergers: Negotiated & Contested Transactions* (1989) 15

Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469 (1987) 63, 69

Burton G. Malkiel, *A Random Walk Down Wall Street* (5th ed. 1990) 68

The New Delaware Takeover Statute (Practicing Law Institute No. 598, 1988) 63

Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319 (1961) 34

Permanent Editorial Board to the Uniform Commercial Code, *PEB Commentary No. 4* (1990) .. 38-39

Restatement (Second) of Conflict of Laws (1967) 36

Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L., Econ. & Organization 225 (1985) 62-63

Robert D. Rosenbaum & L. Stevenson Parker, *The Pennsylvania Takeover Act of 1990: Summary and Analysis* (1990) 64

TABLE OF AUTHORITIES—Continued

	Page
Richard S. Rothberg, *Registration of Fiduciary Securities in 'Street Name': a Look at EPTL § 11-1.10*, 57 N.Y. St. B.J. 34 (1985)	15
C. A. Schipani, *The Lender's Dilemma: National and International Automated Data Complications in Perfecting a Security Interest in Accounts*, 22 New Eng. L. Rev. 273 (1987)	57
Ira L. Sorkin & Carmen J. Lawrence, *An Overview of Stock Loan/Stock Borrowing*, 501 PLI/Corp. 275 (1985)	15
Webster's Third New International Dictionary (1986)	32
E.F. White, *Thompson on Corporations* (2d ed. 1927)	39
Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251 (1976)	62
Periodicals and Other Materials:	
AT&T 1991 Annual Report to Stockholders	17
Katherine Barrett & Richard Greene, *Snow White and the 50 Dwarves*, Financial World, Apr. 17, 1990, at 1	67
BellSouth 1991 Annual Report to Stockholders	18
Thomas Derr, *In Search of Missing Heirs: From Serpico to Senators and Steelworkers*, Focus—Metropolitan Philadelphia's Business Newsweekly, May 14, 1986, at 147	13
Alan Farnham, *Migratory Habits of the 500*, Fortune, Apr. 24, 1989, at 400	66, 67
General Electric 1991 10-K Report	17
General Motors 1991 10-K Report	17
David A. Heenan, *The New Corporate Frontier: The Big Move to Small Town, USA* (1991)	66
IBM 1991 Annual Report to Stockholders	18
Arthur M. Johnson, *The Challenge of Change: The Sun Oil Company 1925-1977* (1983)	67
Justin P. Klein & Jeffrey P. Greenbaum, *Many Pa. Companies Opt Out*, National Law Journal (Mergers & Acquisitions), Sept. 10, 1990, at 15	64

TABLE OF AUTHORITIES—Continued

Page

Robert E. Levinson, *The Decentralized Company* (1983) 66
Michael Lewis, *Liar's Poker* (1989) 51
W. John Moore, *Corporate Kidnapping*, National Law Journal, June 13, 1987, at 2 67
National Association of Unclaimed Property Administrators, *NAUPA News*, Aug. 1988 60
National Association of Unclaimed Property Administrators, *NAUPA Unclaimed Property Brochure* 60
John Pound, *Shut Up, Shareholders—This is Pennsylvania*, Wall Street Journal, Dec. 13, 1989, at A14, col. 3 64
Gregory A. Robb, *S.E.C. Chief Criticizes Bill to Thwart Takeovers*, N.Y. Times, Apr. 3, 1990, at D3, col. 1 64
Unclaimed Property Clearing House, *Voluntary Compliance Manual* (1991) 10
Westinghouse Spurns Statute, N.Y. Times, June 1, 1990, at D2, col. 3 64
William H. Whyte, *CITY: Rediscovering the Center* (1988) 67

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

*Intervening Plaintiff,**

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

BRIEF IN SUPPORT OF EXCEPTIONS FOR PLAINTIFF, STATE OF DELAWARE

JURISDICTION

The original and exclusive jurisdiction of this Court rests upon Article III, section 2, of the United States Constitution and upon 28 U.S.C. § 1251(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The texts of the following provisions are found in Appendix A to this Brief: United States Constitution, art. I, § 8, cl. 3, art. IV § 1, and amend. XIV, § 5; 12 U.S.C.

---

* All of the other states and the District of Columbia have also sought intervention.

§§ 2501 to 2503; Uniform Unclaimed Property Act (1981) §§ 1, 2, 3, 11, 12, 17, 19, 20, 25, 26, 33; Uniform Disposition of Unclaimed Property Act (1966 revision) §§ 1, 5, 7, 9, 10, 11, 13, 14; Uniform Commercial Code §§ 8-207, 9-103; Model Business Corporation Act, §§ 1.40 (21), 7.07, 7.23; New York Abandoned Property Law Articles V and V-A; Securities and Exchange Commission Rules 14a-7, 14a-13, 14b-1, 14b-2, 14c-7, 15c3-2, 15c3-3(e), and 15c3-3 (Exhibit A).

STATEMENT

1. *The Rule of Texas* v. *New Jersey*.—This Court has long recognized the power of the sovereign to take title to abandoned personal property (*bona vacantia*), a power with deep roots in the common law. *See, e.g., Late Corp. of the Church* v. *United States*, 136 U.S. 1, 56-57 (1890); *Society for Propagation of Gospel in Foreign Parts* v. *Town of New Haven*, 21 U.S. (8 Wheat.) 464, 487-88 (1823).

Because this power, now called "escheat,"[1] rests on historical traditions of territorial jurisdictional power—power that may be exercised by multiple sovereigns when a single entity holding intangibles is found in multiple states—conflict among states over the escheat of intangibles became acute. *See Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 (1951); *id.* at 443-45 (Frankfurter, J., dissenting); *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 552 (1948).

---

[1] Rightly or wrongly so-called; early in the common law's development, the term "escheat" referred to the return of land to the feudal lord upon conviction of felony, or upon death without heirs, and *bona vacantia* was the name given to the sovereign's acquisition of personalty. *See infra* p. 34 n.39. In addition, most, but not all, states' unclaimed property statutes do not provide for "escheat" in the sense of cutting off title but are merely "custodial" in nature; a few cut off the former owners' title. Ky. Rev. Stat. Ann. § 393.020 (Michie 1984); Mich. Comp. Laws Ann. § 567.14 (West 1967); N.C. Gen. Stat. 116B-2 (1991); Wyo. Stat. 9-5-202 (1977).

In *Connecticut Mutual Life*, the Court held, over three dissents, that New York might, consistent with the Due Process Clause, escheat unclaimed life insurance proceeds on policies issued on the lives of New Yorkers by insurance companies incorporated outside New York. The Court noted that the claims of other states were not before the Court. 333 U.S. at 548. Justice Frankfurter dissented, arguing that "[w]e ought not to decide any of these interrelated issues until they are duly pressed here by the affected States." 333 U.S. at 555. Justice Jackson put the matter even more forcefully. First, he noted that "[e]scheat survives only as an 'incident of sovereignty,'" 333 U.S. at 560 (dissenting opinion) (quoting *In re Melrose Ave.*, 136 N.E. 235, 237 (N.Y. 1922) (Cardozo, J.)), and discussed why the "two usual examples of escheat" (sovereign power over property and over persons) did not apply to New York's efforts to escheat in that case. 333 U.S. at 560-63. He concluded that the Court should fashion a general rule: "[w]hile we may evade it for a time, the competition and conflict between states for 'escheats' will force us to some lawyerlike definition of state power over this subject." 333 U.S. at 563.

In *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428 (1951), the converse situation was presented, and the Court held that New Jersey's escheat of intangible property held by Standard Oil, a New Jersey corporation, comported with the requirements of the Due Process Clause and the Full Faith and Credit Clause: "stock certificates and undelivered dividends thereon may . . . be abandoned property subject to the disposition of the domiciliary state of the corporation." 341 U.S. at 442. Four justices dissented on the ground that other states' competing claims should be considered. *Id.* at 443-45.

In *Western Union Telegraph Co.* v. *Pennsylvania*, 368 U.S. 71 (1961), the Court again confronted (for the third time in thirteen years) a dispute over unclaimed intangible property potentially subject to competing states' escheat claims—this time, unclaimed Western

Union money orders. The Court held that Pennsylvania could not exercise dominion over unclaimed money orders purchased in that state unless other states would also be bound by the judgment. The Court recognized the need for a uniform and binding set of rules governing competing claims to escheat intangible property and invited the states to invoke the Court's original jurisdiction to resolve the issue, observing that it was "imperative that controversies between different States over their right to escheat intangibles be settled." 368 U.S. at 79.[2]

Soon after, several states accepted the Court's invitation and filed such actions. In *Texas* v. *New Jersey*, 379 U.S. 674 (1965), the Court was squarely presented with competing claims of more than one state to abandoned intangible property—"a question which should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678.

At issue were, nominally, "various small debts" of Sun Oil Company that "small creditors" had not shown up

---

[2] This line of cases came to the Court in the appellate jurisdiction from state courts in cases in which the parties were (a) the state seeking escheat and (b) the holder of the property sought to be escheated (generally a corporation). The opinions discuss several due process considerations—the power of the state seeking escheat to exercise dominion over the intangibles in question, the adequacy of notice provided to the creditors, and the substantive due process rights that protect the holder from having to pay twice, if someone with a better claim later turned up. This claimant was generally envisioned to be the "real owner" of the property, that is, the private party who would assert that she had not abandoned the intangibles in question. The theory was that unless the escheat process protected the holder from having to pay twice, the Due Process Clause was violated. *See Security Sav. Bank* v. *California*, 263 U.S. 282, 284 (1923); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. 233, 242-43 (1944). The 1961 *Western Union* case applied this principle to competing claims by more than one state to escheat the same property, by refusing to permit escheat at the instance of one state until other states' claims could be considered.

to collect or had not cashed checks for. They were of many varieties: uncashed checks payable to third-party creditors, uncashed wage checks, uncashed royalty payments to lessors of oil- and gas-producing land, unclaimed fractional mineral interests, uncashed dividend checks, and undelivered fractional stock certificates resulting from stock dividends. 379 U.S. at 675-76 & n.4. The case itself involved only $27,000, even in the money of that day hardly enough to justify resort in economic terms to this Court's processes. But the case was obviously a test case, and the Court treated it as such, disposing of the issues in broad and clear terms, intended to be applied generally.

The Court began by recognizing that a number of rules for determining the priority of the states' claims to intangible property—various types of debts—might be permissible, and it considered four of them.

It declined the invitation of the State of Texas to evaluate which state had the "most significant 'contacts' with the debt." 379 U.S. at 678. Indeed, the Court rejected "*any* test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts." 379 U.S. at 679 (emphasis supplied).

The Court also declined to adopt a rule looking always to the "domicile of the debtor" (*i.e.*, its state of incorporation), notwithstanding "the obvious virtues of clarity and ease of application." 379 U.S. at 679-80. And the Court declined to adopt a "principal office," "main office," or "principal place of business" of the debtor test: "[a]ny rule leaving so much for decision on a case-by-case basis should not be adopted unless *none* is available which is more certain and yet still fair." 379 U.S. at 680 (emphasis supplied).

Instead, the Court concluded that "since a debt is property of the creditor, not the debtor, fairness among

the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." 379 U.S. at 680-81.

The Court also adopted a "backup rule." Where there is no record of an owner or address ("owner/address unknown"), or where the last known address is in a state that does not provide for escheat of the property, the state of the debtor's corporate domicile was to have the right to escheat. 379 U.S. at 682. The decree entered afterwards, upon consideration of the positions of the respective parties as to its terms, made it plain that "corporate domicile" meant the corporation's state of incorporation. Decree, ¶ 2, 380 U.S. at 518.

2. *Pennsylvania* v. *New York (Western Union)*.—In *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), Pennsylvania, through an original action, renewed its efforts to escheat part of Western Union's unclaimed money order proceeds in situations where neither the payee nor the sender could be located (or in situations where drafts issued in payment or refunded were not negotiated). *Pennsylvania* v. *New York*, 407 U.S. at 207-08. Special Master John F. Davis[3] recommended that the *Texas* v. *New Jersey* rule be applied to all the items involved in the case. 407 U.S. at 212. "He found that '[a]s in the case of the obligations in [*Texas* v. *New Jersey*], [the *Texas*] rule presents an easily-administered standard preventing multiple claims and giving all parties a fixed rule on which they can rely.'" 407 U.S. at 213. Because of the apparent infrequency with which creditors' names and addresses appeared on Western Union's books and records, this recommendation contemplated that significant portions of the unclaimed money orders would escheat to New York, Western Union's state of incorporation.

Pennsylvania took exception, objecting to the likelihood that "the corporate domicile will receive a much larger

[3] Davis had served as the Clerk of this Court from 1961 to 1969.

share of the unclaimed funds here than in the case of other obligations." 407 U.S. at 214. The Court, in an opinion by Justice Brennan, stressed the importance of *stare decisis* and of fixed rules in this area, and rejected the exception:

> we do not regard the likelihood of a "windfall" for New York as a sufficient reason for carving out this exception to the *Texas* rule. . . . [T]he only arguable basis for distinguishing [this case from *Texas* v. *New Jersey*] is that [it involves] a higher percentage of unknown addresses. . . . [T]o vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided —that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

407 U.S. at 214-15 (quoting *Texas* v. *New Jersey*, 379 U.S. at 679).

The Court thus reaffirmed the "backup rule" of *Texas* v. *New Jersey*, which it articulated as follows: "if [the creditor's last known] address does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds 'until some other State comes forward with proof that it has a superior right to escheat.'" 407 U.S. at 210-11 (quoting *Texas* v. *New Jersey*, 379 U.S. at 682).[4]

Three Justices dissented because, in their view, "fairness" required "a relatively minor but logical deviation in the manner in which [the *Texas* rule] is implemented in this case." 407 U.S. at 219. The dissenters considered a strict application of the *Texas* rule to be "inflexible and

---

[4] *See* Decree, 407 U.S. at 223-24 (superior right shown by "proof that the last known address was within that other State's borders"; or "if and when the law of the State of the last known address makes provisions for escheat or custodial taking of such property").

inequitable," 407 U.S. at 222, and thought that the rule should be "modified" for purposes of the case at hand. 407 U.S. at 220.

Two years after the Court's decision in *Pennsylvania* v. *New York*, Congress enacted legislation governing the disposition of money orders and traveler's checks. (Congress expressly excluded third-party bank checks and implicitly excluded all other intangibles.) Congress made an express finding of fact that "a substantial majority" of purchasers of money orders and traveler's checks reside in the states where such instruments are purchased, and also concluded that the cost of maintaining and retrieving addresses in the context of these instruments was a burden on interstate commerce. Pub. L. No. 93-495, Title VI, § 601, 88 Stat. 1500, 1525 (1974) (codified at 12 U.S.C. § 2501) (reprinted at App. A pp. 1a-3a). Congress therefore altered the holding of *Pennsylvania* v. *New York*—but only as applied to money orders and traveler's checks. Congress did not alter the fundamental *Texas* rule.[5] That Congress has the power to do so—whether under the Commerce Clause, the Full Faith and Credit Clause, or its authority to enforce the Due Process Clause of the Fourteenth Amendment under its Section 5—is beyond cavil. Indeed, the Court in *Texas* v. *New Jersey* appears to have contemplated that there might one day be an "applicable federal statute" that would broadly "settle this interstate controversy." 379 U.S. at 677. But no such general statute has been enacted in the nearly three decades since *Texas* v. *New Jersey* was decided.

---

[5] Indeed, Federal Reserve Board Chairman Arthur F. Burns' letter to the Senate Banking Committee (made a part of the Committee Report) acknowledges the general applicability of *Texas* v. *New Jersey*; and the Committee adopted an amendment to the bill designed to insure that its reach would be limited to money orders and traveler's check *only*. S. Rep. No. 505, 93d Cong., 1st Sess. 2-3, 5-6 (1973) (bill should not be interpreted to cover third-party bank checks).

3. *Delaware* v. *New York*.—The rule of these two cases proved abiding—almost two decades passed before this case. During that time Congress has not disturbed the fundamental rules governing escheat of all types of intangible property—with the one exception for unclaimed money orders and uncashed traveler's checks. The rule has been applied to a variety of intangibles—uncashed checks,[6] unclaimed proceeds of class action recoveries,[7] unclaimed health and welfare benefits,[8] unclaimed insurance proceeds of all kinds,[9] trading stamps,[10] gambling winnings,[11] unclaimed refunds,[12] and of course unclaimed securities and dividends and interest on securities.[13]

---

[6] *E.g.*, *Riggs Nat'l Bank* v. *District of Columbia*, 581 A.2d 1229, 1234-35 (D.C. 1990).

[7] *E.g.*, *Friar* v. *Vanguard Holding Corp.*, 509 N.Y.S.2d 374, 376 (N.Y. App. Div. 1986).

[8] *E.g.*, *Aetna Life Ins. Co.* v. *Borges*, 869 F.2d 142, 147-48 (2d Cir.), *cert. denied*, 493 U.S. 811 (1989).

[9] *E.g.*, *Employers Ins.* v. *Smith*, 453 N.W.2d 856, 863-64 (Wis. 1990) (workers compensation); *Louisiana Health Serv. & Indem. Co.* v. *McNamara*, 561 So. 2d 712, 717-18 (La. 1990) (health insurance); *Revenue Cabinet* v. *Blue Cross & Blue Shield of Ky.*, 702 S.W.2d 433, 434-35 (Ky. 1986) (same); *Treasurer & Receiver General* v. *John Hancock Mut. Life Ins. Co.*, 446 N.E.2d 1376, 1382-83 (Mass. 1983) (life insurance); *South Carolina Tax Comm'n* v. *Metropolitan Life Ins. Co.*, 221 S.E.2d 522, 523-24 (S.C. 1975) (same).

[10] *O'Connor* v. *Sperry & Hutchinson Co.*, 379 A.2d 1378, 1381 (Pa. Commw. Ct. 1977), *aff'd*, 412 A.2d 539 (Pa. 1980).

[11] *E.g.*, *State ex rel. Marsh* v. *Nebraska State Bd. of Agriculture*, 350 N.W.2d 535, 540 (Neb. 1984); *State* v. *Elsinore Shore Assocs.*, 592 A.2d 604, 605-07 (N.J. Super. Ct. App. Div. 1991).

[12] *E.g.*, *Arkansas Dep't of Fin. & Admin.* v. *City of N. Little Rock*, 659 S.W.2d 937, 937-38 (Ark. 1983) (utility company deposits); *Cory* v. *Public Utils. Comm'n*, 658 P.2d 749, 751-53 (Cal. 1983) (utility overcharges); *South Carolina Tax Comm'n* v. *York Elec. Coop.*, 270 S.E.2d 626, 627-28 (S.C. 1980) (coop reimbursements); *Presley* v. *City of Memphis*, 769 S.W.2d 221, 224 (Tenn. Ct. App. 1988) (concert tickets).

[13] *Scierstad* v. *Serwold*, 716 P.2d 885, 888-89 (Wash. 1986); *State Dep't of Revenue* v. *Puget Sound Power & Light Co.*, 694

Most states have now amended their laws to conform to the *Texas* rule, and for some states the rule has resulted in a reliable source of revenue. Delaware, for instance, relies on a stream of escheated property currently totalling approximately $20 million annually.

Thus, after the decision in *Texas* v. *New Jersey*, more than twenty states adopted the 1966 revision of the Uniform Disposition of Unclaimed Property Act, 8A Uniform Laws Ann. 135 (1983) (App. A pp. 17a-26a). That uniform act generally allows the state of the owner's last known address to escheat (§ 10); otherwise, it requires persons *holding* unclaimed property to report and deliver it to the state (§§ 11, 13). The more recent 1981 Uniform Unclaimed Property Act (now adopted by twenty-seven states), 8A Uniform Laws Ann. 617 (1983) (App. A pp. 4a-17a) evidences a similar focus on the "holder"—the person indebted to another or in possession of property belonging to another (§ 1(8)). It looks to "the records of the holder" to determine the last-known address (§ 3(1)) and provides that the enacting state takes under the backup rule if "the holder is a domiciliary or a government or governmental subdivision or agency of this State" (§§ 3(3)(ii), 3(4), 3(5)). "Domicile" as to a corporation means "the state of incorporation" (§ 1(6)).

In reliance on the *Texas* rule and these uniform statutes complying with it, forty-four states and the District of Columbia have joined together to participate in the Unclaimed Property Clearing House, a "multi-state cooperative effort to simplify the reporting and collection of abandoned securities and associated cash." Unclaimed Property Clearing House, *Voluntary Compliance Manual* 1 (1991). Of the most populous states, only New York is

---

P.2d 7, 12 (Wash. 1985); *State* v. *Liquidating Trustees of Republic Petroleum Co.*, 510 S.W.2d 311, 313-15 (Tex. 1974); *State* v. *New Jersey Nat'l Bank & Trust*, 298 A.2d 65, 66-67 (N.J. 1972); *State ex rel. Mallicoat* v. *Coe*, 460 P.2d 357, 358-59 (Or. 1969); *In re Northeast Utils.*, 479 F. Supp. 194, 198-99 (D. Conn. 1979).

not a member.[14] Each member state signs a form of agreement providing in pertinent part:

> 1. The holdings of the U.S. Supreme Court in *Texas v. New Jersey* (85 S. Ct. 1136) and *Pennsylvania v. New York* (92 S. Ct. 2880) regarding which state has the right to escheat property shall be followed:
>
> (a) Where the name and last known address of the apparent owner according to the books and records of the holder is in [State], it shall be deemed reportable to [State].
>
> (b) If the *holder* has no records whatsoever setting forth the name and last known address of the apparent owner, the property shall be deemed reportable to the *state of incorporation of the holder.*

Clearing House Agreement (Special Consultant's Contract) Ex. 1 ¶ 1 (App. B p. 80a) (emphasis supplied).[15]

This case is about a particular class of intangibles subject to the backup rule of *Texas* v. *New Jersey* and described in paragraph 1(b) of the forty-four-state Clearing House Agreement. The unclaimed intangibles at issue in this case arise because securities are often held by persons other than the beneficial owner, for a variety of reasons described below. *See infra* pp. 13-15 & n.19. In

---

[14] Besides New York, the following states were *not* members at the time of the cited publication: Georgia, Hawaii, Maryland, Minnesota, Oklahoma, Rhode Island, South Carolina, and Wyoming. We understand that Hawaii, Minnesota and Oklahoma have since joined, making forty-four state members, plus the District of Columbia.

[15] We do not mean to suggest that their execution of the Special Consultant's Agreement bars the signatory states as a matter of contract from taking their present position. A reservation of rights provision in the Agreement (Ex. 1 ¶ 2, see App. B p. 81a) appears to provide that they are not so barred. But the forty-four states' execution of the Agreement with ¶ 1 in it speaks powerfully as to what the general understanding of the states was as to the meaning of the *Texas* case.

many cases, these holders are listed as holders of record on the issuer's books and receive the property directly from the issuer; in other instances, the holder of the unclaimed property has, instead, received the property from a "depository" that is the holder of record on the issuer's books. (Depositories generally hold securities *only* for the accounts of "participant" brokers and banks. DeCesare Dep. 14-15.) The largest and best-known depository is the Depository Trust Company ("DTC"). In addition to the depositories, the holder entities involved in this case are stockbrokers and banks acting as custodians.

This case concerns only moneys that come into the hands of these holders and are owed by them to persons that they cannot identify, generally because of errors, transfer delays, or imperfections in the systems maintained by the depositories, brokers, and banks.[16] This case, then, does not involve *Texas* v. *New Jersey*'s "primary rule," which governs the property of "lost shareholders" (or bondholders) listed on the books and records of the issuer company—or "lost customers" listed on the books and records of a stockbroker—but no longer in touch with the company or broker. The incidence of these "lost stockholders," "lost bondholders," and "lost customers" and of their escheatable property is apparently very substantial. However, no evidence of its size or relationship to the size of the unclaimed property involved in this case is in the record.[17]

---

[16] These amounts were called "overages" or "overs" by some of the witnesses. *E.g.*, DeCesare Dep. 119; Cirrito Dep. 86-87. There was testimony in the record that systemic improvements were in the process of being worked on, which were intended to have the effect of reducing the occurrence of these overages. DeCesare Dep. 79-83; Cirrito Dep. 150-53. To the extent that these systemic revisions are implemented and have the anticipated result, the amounts involved in the subject matter of this case would be reduced in the future.

[17] Such information as exists from publicly-available sources strongly suggests that the universe of securities and distributions escheatable under the primary rule far exceeds that involved in the present case and escheatable under the backup rule. SEC Commis-

Holders such as these, holding stock for beneficial owners or other such holders, serve a number of well-established functions in the securities industry: they allow beneficial owners the privacy that anonymity pro-

---

sioner Grundfest, giving comments on an early version of the Delaware takeover legislation being considered in 1988 (*see infra* pp. 63-64), referred to studies indicating that approximately 5% of stockholders never responded to tender offers, regardless of how favorable they were. *Delaware's Proposed Antitakeover Legislation: Hearings Before the House Judiciary Committee of the Delaware State Legislature* 13-14 (Statement of SEC Commissioner Grundfest) (Jan. 20, 1988). Presumably a substantial number of these silent stockholders were "lost"; the issuer no longer was in contact with them, although it had their last-known addresses. Published materials indicate that a search firm devoted to attempting to find lost stockholder estimates that in publicly-held companies, between one-half of one percent and two percent of the stockholders on the companies' records of stockholders' names and addresses are "lost." Thomas Derr, *In Search of Missing Heirs: From Serpico to Senators and Steelworkers*, Focus—Metropolitan Philadelphia's Business Newsweekly, May 14, 1986, at 147 (quoting a spokesperson for Keane Tracers, Inc.).

The total approximate market value of all publicly-held corporate stock actively traded in the United States is $4.367 trillion. Board of Governors of Federal Reserve Sys., *Flow of Funds Accounts, Financial Assets and Liabilities, Fourth Quarter 1991*, at 44 (March 12, 1992) (hereinafter, "*Flow of Funds*"). If one were to take the conservative figure of one percent of the stock being held by "lost" stockholders, the value of their stock would be $43.7 billion. A "haircut" on this number might well be appropriate because one could assume that "lost" stockholders are more likely to be on average smaller stockholders than those who are not lost, and that those stockholders who keep their stock with stockbrokers or bank custodians are, arguably, less likely to become "lost" than those holding it on the company's books. However, even if one assumes a very radical haircut of 80%, a figure of $8.7 billion escheatable under the primary rule is produced. This figure is much in excess of the several hundred million dollars presumed to be involved under the backup rule in this case. *See* New York's Response to First Set of Interrogatories Propounded by Alabama, *et al.* at 5-6 (Answer to Interrogatory 5(d)) (Apr. 27, 1990) (showing annual totals of $40 million to $210 million remitted to New York by DTC, Broker/Dealers and Financial Institutions between 1985 and 1989, with

vides (within certain limitations established by law);[18] they allow beneficial owners to have, and the stock brokerage community to provide, "cash management accounts" in which dividends and interest paid on the customer's securities do not go directly to the customer, but are held by the broker for his account, at interest, usually subject to withdrawal by a check-like negotiable instrument; they facilitate brokerage margin accounts, where the customer's securities are held by the broker as collateral and the dividends and other distributions can reduce the customer's margin debt to the broker; they facilitate the operation of trusts in which the distribution of current income may not be mandatory, but discretionary; they allow for dividend reinvestment programs, where a nominee holds fractional shares purchased with dividends; they allow the efficient transfer of securities by taking certificated securities out of the names and safe deposit boxes of individual investors and putting them in the name and custody of a stockbroker, and, with the growth of depositories, even taking them out of the individual brokers' names and vaults and putting them in the name

---

five-year total of approximately $450 million); New York's Response to Delaware's First Interrogatories, Schedule I (March 6, 1989) (showing total of approximately $139 million escheated by New York from Delaware brokerage firms between 1972 and 1988). Moreover, the figures just given for the amount escheatable under the primary rule do not include debt securities, while debt securities are included in the backup rule situation involved in the present case. The total dollar volume of debt securities publicly-traded (excluding U.S. government securities and mortgage pools) in the United States is $2.84 trillion ($1.082 trillion of tax-exempt securities, and $1.758 trillion of corporate and foreign bonds). *Flow of Funds*, at 44. Publicly-traded mortgage pools are another $1.168 trillion. *Id.* at 46.

[18] For example, when a beneficial owner or group of beneficial owners beneficially owns more than 5% of a class of equity securities of an SEC-registered company, it or they must file a "Schedule 13D" disclosure statement. Securities Exchange Act § 13(d), 15 U.S.C. § 78m(d); *see also* Securities Exchange Act § 16(a), 15 U.S.C. § 78p(a) (directors, officers and 10% stockholders).

of the depository, where they can be transferred to other depository participants simply by entry on the depository's books.[19]

This last function has now largely been fulfilled by DTC, which "immobilizes" securities certificates. DTC was created by securities brokers and dealers, stock exchanges and banks in order to "immobilize" certificates, so as to alleviate the paperwork crisis that had developed as a result of the physical deliveries of certificates in connection with trading. DTC Statement (filed with the Master March 16, 1990, and marked as DTC Ex. 13) at 1; DeCesare Dep. 377. In responding to that crisis, the interindustry committee responsible for the creation of DTC considered and rejected a proposal that would have made the depository a "*transfer agent* for the issuer." DTC Statement 3 (emphasis by DTC). DTC has no contractual relationship with issuers, except in cases of DTC "book-entry-only" securities, which do not give rise to abandoned property under the backup rule. *Id.* at 4 n.*.[20]

---

[19] *See generally* J. Robert Brown, Jr., *The Shareholder Communication Rules & the SEC*, 13 J. Corp. L. 683, 687-93, 695 n.59 (1988) (discussing advantages of nominee ownership); Egon Guttman, *Modern Securities Transfers* ¶ 4.04[1][d][i] at 4-16 to 4-17 (1987) (discussing use of street name to facilitate transfer of securities); Ira L. Sorkin & Carman J. Lawrence, *An Overview of Stock Loan/Stock Borrowing*, 501 PLI/Corp. 275, 279 (1985) (role of DTC in pledging securities); 7 William D. Hawkland, *et al.*, *UCC Series* § 8-303:02 at 210 (1990) (use of securities as collateral in margin accounts); Simon M. Lorne, *Acquisitions & Mergers: Negotiated & Contested Transactions*, § 3.09[2][b] at 3-56 to 3-57 (1989) (same); Richard S. Rothberg, *Registration of Fiduciary Securities in 'Street Name': a Look at EPTL § 11-1.10*, 57 N.Y. St. B.J. 34, 35 (1985) (benefits of street name registration for fiduciary and trust accounts); DeCesare Dep. 202 (dividend reinvestment plans must allow for nominee participation), 377 (depository system facilitates transfer of securities), 430-32 (depository facilitates pledging of securities); Wellener Dep. 36-37 (dividend reinvestment plans).

[20] Even in this situation, DTC is the holder of record of the entire issue, but does not purport to act as agent for the issuer.

[Footnote continued]

DTC's "core service" is to provide for "the efficient settlement of securities transactions with physical certificates immobilized in a central location." *Id.* at 6-7. The immobilization requires DTC to provide what it considers "ancillary services," as well—including the "collection and payment of dividend and interest distributions." *Id.* at 7.

The practice by stockbrokers, bank trust departments and custodians, and, lately, depositories, of holding securities in their own names rather than the beneficial owners holding them in theirs, is sometimes called holding securities in "street name" or in "nominee name." [21] These intermediate holders serve numerous functions and their role in the securities industry predates even the first federal securities legislation.[22] One function they do not serve well, however, is the efficient distribution of dividends, interest and other distributions. Obviously, in terms of pure efficiency in getting the moneys from the issuer to the beneficial owners, it would be best if all the beneficial owners appeared on the issuer's record.

---

[20] [Continued]

DeCesare Dep. 156 ("we hold 100 percent of what's outstanding in a single certificate"), 209-10 (statement of DTC's counsel that DTC holds a certificate as recordholder under U.C.C.).

[21] While the stockbrokers, bank custodians and depositories are sometimes called "nominees," strictly speaking, "nominee" refers to an entity, generally a partnership composed of officers of the bank or depository, which adopts a short name and holds securities for the account of the depository, bank trust department or other holder, in order to avoid, through the use of a partnership name, the onerous stock transfer requirements that may attend transfers by a corporation and particularly by a corporate fiduciary. Probably the best known nominee in this sense is the nominee of the DTC, "Cede & Co."

[22] *See Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *North Eur. Oil Royalty Trust*, 490 A.2d 558 (Del. 1985); S. Rep. No. 1455, 73d Cong., 2d Sess. 76 (1934); *Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities* (Dec. 3, 1976) (hereinafter "*SEC Street Name Study*") at 1-3.

DeCesare Dep. 405-07. But for the various reasons just outlined, they do not. Moreover, in many situations—as, for example, margin accounts that are not fully collateralized, margin accounts with sweep features but negative cash balances (Principe Dep. 53), or certain trust accounts—there may be an intent *not* to distribute cash dividends to the beneficial owner of the underlying security.

By 1965, when the Court decided *Texas* v. *New Jersey*, 23.7 percent of the equity securities of publicly-owned companies was held in nominee and street name. *SEC Street Name Study* 78. By 1975, shortly after the Court decided *Pennsylvania* v. *New York*, the proportion had risen to 28.6 percent. *Id.* The trend toward securities certificate immobilization has continued. During the 1980s, it passed the 50 percent mark.[23]

As these figures indicate, the practice of "street name" or "nominee" registration is far from universal. Many investors, large and small, prefer to be stockholders of record. There are only a handful of depositories and probably no more than a few thousand stockbrokers and bank trust departments/custodians actively engaged in holding securities for the accounts of participants or customers. Yet annual SEC filings for 1991 indicate that, for example, American Telephone & Telegraph Company had 2,426,354 common stockholders of record; General Motors had 1,774,420 stockholders of record of its various classes of common stock; General Electric had 490,000 common stockholders of record; IBM had 772,047 common stockholders of record; and BellSouth had 1,355,908 stockholders of record.[24] Thus the vast majority in number of their recordholders were also beneficial owners.

---

[23] Division of Market Regulation, SEC, *Progress & Prospects: Depository Immobilization of Securities & Use of Book-Entry Systems* 4 (June 14, 1985).

[24] AT&T 1991 Annual Report to Stockholders, inside back cover; GM 1991 10-K Report, p. II-45; GE 1991 10-K Report, pp. 21-22;

New York's practice with respect to all unclaimed stock and distributions held by these intermediate holders has been particularly aggressive. New York does not participate in the cooperative efforts of the Unclaimed Property Clearing House. It has an overbroad statute, calling for the delivery to New York of all abandoned securities held by brokers doing business in New York—without regard to whether the holder's records indicate that the owner's last known address is in New York, or (if there is no known owner or address) whether the broker is incorporated in New York.[25] To make matters worse, New York's three-year dormancy period is the shortest in the nation. *See* Egon Guttman, *Modern Securities Transfers* at S16-2 to S16-32 (3d ed. Cum. Supp. 1991).[26] New York's aggressiveness—and the reliance of other states on the *Texas* rule—is illustrated by a letter on the letterhead of Texas' then Treasurer (now Governor), Ann Richards, to E.F. Hutton, a brokerage firm that did business in New York (but was incorporated in Delaware). Ms. Richards' representative wrote to express her department's frustration with the broker's practice of submitting *all* unclaimed intangibles to New York: "the rule adopted [in *Texas* v. *New Jersey*] requires reporting to the state of last-known address of the creditor (or owner) as shown by the debtor's (holder's) books and records; and if there is no last-known address, then to the state of incorporation of the debtor." [27]

IBM 1991 Annual Report to Stockholders, p. 53; BellSouth 1991 Annual Report to Stockholders, p. 62.

[25] N.Y. Abandoned Property Law § 511 (McKinney 1991) (App. A pp. 38a-48a). New York has not amended its statute to comport with the requirements of *Texas* v. *New Jersey*.

[26] Some other states also have a three-year period. *See, e.g.*, Cal. Civ. Proc. Code § 1513 (West Supp. 1992).

[27] Letter of October 16, 1986 (Appended to N.Y. Supp. Reply Br. (Nov. 20, 1991)) (App. C hereto at p. 82a). Unlike its current position, Texas there made no suggestion that E.F. Hutton should be

New York takes possession of unclaimed "owner/address unknown" cash and other intangibles held by DTC (a New York banking corporation) without question from Delaware; the same is true with such property held by New York banks. But a large number of brokerage houses are incorporated in Delaware.

Delaware therefore commenced this action in this Court to collect the "owner/address unknown" funds that were taken by New York from "Delaware Brokerage Corporations." Delaware's suit was a narrowly drawn one, entirely dependent on the application of the settled rules of this Court's prior decisions to the facts of what New York was doing. Because the exclusive forum for suits between states is this Court, Delaware's case, although having elements of a "collection" suit, had to be brought here; indeed, New York, urging that the case did not involve substantial questions of law but only factual issues, contended that this Court should exercise its discretion not to hear it. Brief of N.Y. in Opp. to Motion for Leave to File Complaint 24 (May 9, 1988). New York's substantive position was that the property in question, which appears to be "owner/address unknown," actually is not; New York claims that all the unknown owners whose funds are held by stockbrokers may be "statistically" presumed themselves to be stockbrokers, with "trading addresses" in New York. *See* Report 58-59 & n.50.

Early on, Delaware found allies in several states who appeared as *amici curiae* in its support and asserted that "New York is not entitled to escheat unclaimed intangible property held by brokers conducting business in New York but incorporated elsewhere."[28] They expressed a "sig-

---

looking to the state of principal executive office of each issuer of owner unknown property, or that the *issuer* was somehow the "debtor." On the contrary, the "holder" is described by Texas as the "debtor." The debtor's domicile was its "state of incorporation."

[28] Brief of *Amici Curiae* Pennsylvania, Florida, Rhode Island, New Jersey, Arizona, Utah, and Arkansas (May 9, 1988) at 2.

nificant interest in this matter because they rely upon the rules of priority established by the Court . . . . Adherence to these equitable standards enables *amici* States to avoid litigation resulting from inconsistent claims to the same property. The relief sought by Delaware is compatible with the rules followed by *amici* States." *Id.* Again, *amici* reiterated: "[i]f no record is available, or if the state with priority had no escheat law, then the state of the *holder's* incorporation [is] entitled to escheat the property." *Id.* at 5, 9 (emphasis supplied).

4. *Reference to the Master.*—After granting Delaware's motion to file its complaint, the Court appointed a Special Master. 488 U.S. 990 (1988). There followed massive interventions in what resembled a feeding frenzy. Delaware's early *amici*, who had viewed Delaware's position as consistent with the "salutary holding of *Texas* v. *New Jersey*" (Brief of *Amici* at 10), came to see an opportunity to modify the rules and collect a windfall. Starting in 1989, they sought intervention, as did every state in the Union (and the District of Columbia),[29] advocating one or another theory that would allow them to recover the money at issue under the backup rule.[30] Unclaimed intangibles held by DTC and the New York bank nominees were added to the scope of the case when the Court granted Texas' motion to intervene, greatly increasing the case's scope.[31]

---

[29] The last of these applications to intervene, that of Massachusetts, came only in March 1992, two months after the Master's Report.

[30] The Court has not passed on any of the applications for intervention other than that of Texas, but the Master has favorably recommended all of the motions to intervene that he received prior to January 28, 1992 (Report 5), and the states seeking leave to intervene have been permitted to participate before the Master as fully as if this Court had approved their intervention.

[31] In comparison to the roughly $450 million remitted by DTC, Broker/Dealers and Financial Institutions during the period 1985 to 1989, New York received only $139 million of funds remitted

Two new theories emerged. A group led by Texas urged a modification of the rule previously called "salutary"—they argued that the state of incorporation of the *issuer* should be entitled to escheat the unclaimed funds, rather than the state of incorporation of the *holder* (as per the Texas letter, the practice of forty-five jurisdictions through the Unclaimed Property Clearinghouse, and the brief for the seven early *amici* states). This, although the funds were no longer held by the issuer (who indeed had no claim whatsoever to them). Among the Texas group are former *amici* Florida, New Jersey, Pennsylvania, Utah, Arkansas, and Arizona.

A group with a more radical agenda was led by California. This group's theory called for an outright overruling (at least in the present situation) of the backup rule, and its replacement with a test to be determined by the states in a process of negotiation or binding arbitration once the Court overruled *Texas* v. *New Jersey*. That test has not been articulated with any precision by this group but it seems to be related to the incidence of investor activities throughout the United States. Among this group is former *amicus* Rhode Island.

Various motions for judgment on the pleadings and for partial summary judgment were filed. The Master allowed limited discovery, only on the subject of how

---

from *Delaware* Brokerage Firms for a much longer time period (1972 to 1988). *See supra* pp. 13-14 n.17. Because the DTC and the New York banks were New York-domiciled, Delaware's complaint did not seek "owner/address unknown" property in their hands (or in the hands of brokers not incorporated in Delaware). By seeking a revision or reinterpretation of the *Texas* v. *New Jersey* "backup" rule to refer to the corporate domicile of the "issuer" of the securities on which the distributions had been paid, rather than the holders who owed them to an unknown creditor, the Intervenors attempted to get a share of the larger pie ($450 million), which includes that held by the Delaware brokerage firms that were the original object of the suit. (The figures for the "larger pie" may be swollen by New York's proper or improper escheats of dormant broker customer accounts, for which of course there are names and addresses. *See* Principe Dep. 110.)

the present nominee dividend and interest distribution system works; he permitted no discovery on any other matter, such as the consequences of changing or reinterpreting the escheat rules.[32]

5. *The Master's Report and Recommendation.*—The Master's Report recommends two changes to the *Texas* rule—one acknowledged, the other not. *First*, the Report recommends that the terms "debtor" and "creditor" used in *Texas* v. *New Jersey* and *Pennsylvania* v. *New York* should be viewed merely "as an attempt to identify the relevant parties" rather than as a description of legal relationships. The Report purports to have discovered a federal common law definition of the term "debtor" that bears no relation whatever to the state property laws giving rise to the unclaimed property in this case. Under this federal common law, the state laws that govern the establishment of and rights—both private and public—in the property at issue are to be ignored; instead, according to the Report, the "relevant attributes" of the parties to each type of transaction must be evaluated in order to determine which ones are *most like* the parties in *Texas* v. *New Jersey* and *Pennsylvania* v. *New York*. The Report goes on to conclude that the task is impossible in this case. Report 32-34. Therefore the Report resorts to a "tie-breaker" by intuiting which interpretation would be more "fair." Report 35. Under this approach—which ignores the ordinary meaning of the words debtor and creditor—the Report concludes that the *issuer*, rather than the *holder*, should be viewed as the "debtor."

Second, the Report recommends that the Court abandon the part of the backup rule that views the state of incorporation of a corporate "debtor" as its "domicile" and thus entitled to escheat; instead, the Report recommends that the state of the "principal executive office" of

---

[32] Indeed, the Master denied an application by Delaware, following the Master's exposure of a draft report reaching substantially the same conclusions that his Final Report did, that discovery be permitted before the Master's Report was made final. Discovery Order No. 15 (Jan. 28, 1992).

the corporate "debtor" (of course, as redefined) should be entitled to escheat. This modification was proposed by the Master *sua sponte*—no one (not even the California group) suggested that the backup rule thus be modified until after the Master circulated a draft of his Report containing such a recommendation for comment. The Report contains no definition of how far this recommendation applies. Is it just for this case? Or is it supposed to operate as an overall replacement for the "state of incorporation" in the backup rule of *Texas* v. *New Jersey?* Other than (1) what may be gleaned from a somewhat cryptic footnote in the Report (p. 35 n.32) suggesting that the abandonment of the "state of incorporation" rule would assist in making the "debtor is the issuer" rule "fair" and (2) the Report's discussion of the pertinence of securities issuers' SEC reports (Report 44-48),[33] no limiting principle is apparent in the Report.

The Report did not undertake to say what its recommendation was as to who should prevail between the plaintiff Delaware and the defendant New York if the Master's recommendation about the "issuer as debtor" theory of the Texas Intervenors and his spontaneous substitution of "principal executive office" for "state of incorporation" were not accepted by the Court. However, the Master's discussion of New York's arguments concerning the backup rule (Report 67-68) clearly indicated that Delaware was to prevail in such case.

SUMMARY OF ARGUMENT

I. Neither of the two rule changes recommended in the Report, one acknowledged as a change by the Master and the other not, should be adopted.

A. 1. Contrary to the Master's conclusion, there is no reason to believe that this Court used the word "debtor"

---

[33] But looking the other way, see the Draft Report's consciousness that the new rule might be applied "in other cases (or circumstances)." Draft Report 57 n.64, quoted in our Exceptions at E-8.

in the *Texas* and *Pennsylvania* cases in other than its usual and conventional meaning—one who owes something to another. The Master's construction, indeed, requires one to assume that the Court used that word in two different senses on the same pages in those decisions. Under the law of all 50 states, the "issuer" of securities is not a debtor of anyone with respect to a dividend or interest distribution once the issuer has paid it to the security holders shown on its record. Construing "debtor" to mean what state law considers to be a debtor is rooted in the tradition of escheat cases prior to the *Texas* case; the Master's recommendation goes beyond the traditional limits of substantive due process taught by those earlier decisions. *In personam* jurisdiction due process questions join to suggest that the Master's recommendation is so extraordinary as to be suspect.

2. Under state law, the issuer is not a "creditor" of the nominee holder, nor a debtor of the beneficial owner; and the record establishes that the nominee holders are not agents of the issuer. The Uniform Commercial Code in all 50 states and state corporation law confirm that the issuer discharges its indebtedness with respect to a distribution by properly paying the holder of record. Commercial practice also confirms this. The reasons given by the Master and the Intervenors for ignoring these uniform rules are without merit. The Master's approach is metaphoric rather than legal and the Intervenors cite either state statutes that provide options which issuers never use or SEC rules that are inapplicable to dividends and do not mean what the Intervenors contend.

3. The Master's recommendation on this score is in essence that the state law as to who is a debtor should be ignored. But in this case, the federal law with respect to the permissibility of escheat necessarily builds on state law. It is property created by state law that is the subject of escheat. There is no federal reason to displace state law in this situation. It would compound the error

not only to displace state law, but to displace state law which happens to be uniform in all 50 states.

4. The Master's suggestion that "fairness" demands that the money in question be "sent back where it came from," to the issuer, as a sort of "tie-breaker," is based on the Master's personal notions of fairness which hardly seem necessary ones; the "send it back where it came from" rule has been rejected by this Court before, and making a rule change purely for the sake of alleged "fairness," in the terms conceived by the Master, appears to be a choice for the legislative branch.

B. The Master's *sua sponte* change in the definition of corporate domicile from "state of incorporation" to "state of principal executive office" is likewise unjustified.

1. No developments in the law since 1965 indicate that the choice made by the Court in the *Texas* case and reaffirmed in the *Pennsylvania* case should be abandoned. This Court has, indeed, in the intervening period, repeatedly stressed the important role of the incorporating state in corporate matters.

2. The present rule works well administratively. The replacement rule suggested by the Master is unworkable and will be a source of litigation and conflict; even the provisions of the U.C.C. that the Master finds establish workability demonstrate exactly the contrary. Moreover, even the prop the Master has suggested be used—the principal executive office address given in SEC filings —is unavailing if the rule is applied beyond the narrow context of the present case and to the extent of the backup rule generally, since it will involve corporations that are not SEC filers. The Master suggests no limiting principles why the rule change as to the determination of corporate domicile should be limited to the specific situations involved in this case.

3. Fairness demands retention, not rejection, of the present rule as to corporate domicile. A properly chosen

state of incorporation can provide significant benefits to shareholders, as recent academic analyses and studies indicate. Given recent developments in real-world corporate sociology, the same cannot be said with any confidence as to the state of "principal executive office." The location of principal executive offices has over the decades ceased to have any relevance to the productive activities of corporations and has become more and more a personal choice by a small cadre of top corporate executives.

4. Here again, the Master's notions of "fairness" are misconceived. The Master also ignores the public-sector efforts that a state, like Delaware, must make in order to provide its corporations with a properly functioning statute and a judiciary attuned to sophisticated issues of corporate law; it would be unfair to disregard those efforts.

C. Both with respect to the corporate domicile rule change and as to his recommendation that the issuer is to be considered the "debtor," the Master ignores the principles of *stare decisis* that have been taught by the decisions of this Court, and violates the expectations of the states expressed by their adoption of the uniform escheat acts.

II. Should the Court, contrary to our contentions, accept one or both of the Master's recommendations for rule changes, the ruling should not be made retroactive as the Master suggests. Retroactivity would cause the states that relied on the plain language of the *Texas* and *Pennsylvania* cases and adopted the uniform acts implementing them to be divested of property escheated in reliance on them. The very purpose of the *Texas* rule was to have a clear, certain and simple rule "once and for all" to resolve conflicting state claims for escheat. Retroactivity here would disturb Delaware's justifiable reliance on the rules laid down in the *Texas* case and would be inconsistent with this Court's precedents concerning retroactive application of changes in judge-made

legal rules, particularly in the context of asserting retroactivity against a state.

III. The Master rejected New York's theories underlying its factual assertions about the moneys originally at issue in this case. New York's contention that the moneys in the hands of brokers owed to persons unknown should, on a statistical basis, be deemed to be owed generically to "other brokers," and that all those other brokers should be deemed to have "trading addresses" in New York, was rejected by the Master, and properly so. The record amply confirms the Master's findings on this point.

But because the Master proceeded on his theory of "the issuer as debtor" and on his rule change concerning the test of corporate domicile, the Master never drew the conclusions that necessarily would flow from those findings, should this Court not follow his recommendations that the "issuer" was the "debtor" and that the corporate domicile rule should be changed. However, it follows necessarily from the Master's correct findings about New York's theory that Delaware should have judgment against New York, and this Court should so rule.

ARGUMENT

I. THE COURT SHOULD ACCEPT NEITHER THE MASTER'S UNACKNOWLEDGED CHANGE TO THE BACKUP RULE—THAT "ISSUER" BE SUBSTITUTED FOR "DEBTOR"—NOR HIS ACKNOWLEDGED CHANGE—THAT "STATE OF PRINCIPAL EXECUTIVE OFFICE" BE SUBSTITUTED FOR "STATE OF INCORPORATION"

The Master's Report, if followed by this Court, would destroy the stability that the Court's earlier decisions have brought into this field and would unsettle the law in an area where litigation involves the exclusive original jurisdiction of this Court. The Master proposed two

rule changes: the first rule change, not acknowledged as such, applies a theory of "federal common law" to set aside the definition of who is a debtor under the laws of all 50 states. The second overrules a prescription of corporate domicile for escheat purposes followed in the two original cases and having its roots in the prior escheat jurisprudence. The alternative rule proposed is arbitrary, amounts to change for change's sake, and particularly if applied beyond the scope of this case—as well it may, since it is without limiting principle—will be the source of great administrative difficulties. Following the Master's recommendation would involve a departure from this Court's decisions on the proper application of the rules of *stare decisis*. The Master's notions of "fairness," which prompted the rule changes, seem hardly persuasive; but if they are, presumably the matter of changing the rules can be left to the attention of Congress.

A. In the Circumstances Involved in This Case, the "Issuer" Is Not a "Debtor" with Respect to the Dividends and Interest Under State Law, and Should Not Be Regarded as a "Debtor" by This Court for Purposes of Escheat

Following a circuitous path, the Report accepts the position of the Texas group and recommends that the "issuer" (rather than the holder of the unclaimed property) be deemed the "debtor" under the *Texas* rule. The Report begins with a fundamental misapprehension about the nominee system: that it was designed for the purpose of speeding the *distribution of dividends* and therefore "the distribution system's use of intermediaries may have originated as a matter of convenience." Report 25. There is absolutely no evidence in the record, and no party contended, that nominee holders exist in the chain of title between the issuer and the ultimate beneficial owners of securities for the purpose of "convenience" in getting dividends into the hands of the beneficial owners. As we explained above (*see supra* pp. 13-15 & n.19), the nominee

system was designed to perform a number of functions *other* than the distribution of dividends; efficient distribution of dividends is accomplished largely *in spite of* the presence of nominee holders.

The Report then appears simultaneously (1) to reject the relevance of state law to the determination of the identity of the "debtor" and (2) to suggest that under state law the recordholders may not be debtors of the persons for which they are nominees (suggesting that possibly the issuer is). This latter suggestion appears to proceed from a misconception that the recordholders do not consider themselves as possessing an "asset" in the form of the moneys in turn owed to the unknown creditor. Report 25-26.

This statement is controverted by the record and other evidence. It is clear that the cash in the hands of the recordholders is viewed as an asset and that there is a corresponding liability. *See* American Institute of CPAs, *Audits of Brokers & Dealers in Securities* 34-36 (1973) (listing "Failed to Deliver" accounts and customer accounts as assets, with corresponding liability for "unclaimed dividends") (Lodged with the Clerk by New York (May 9, 1988), Tab C); Cirrito Dep. 84. The DTC uses the excess cash from the "overages" in its hands at issue in this case to pay its expenses in attempting to find the creditors and distributes the surplus annually to its participants. DeCesare Dep. 152-53, 317, 475. The brokerage houses are free to use these funds in their business, subject only to certain limitations, not applied on an individual basis, similar to those applicable to any customer's funds in a broker's hands. *See infra* pp. 44-45 & n.57. Subject to those limitations, the brokers and banks put the moneys in their general bank accounts; in whatever account, they appear to earn and retain the interest on these funds. Shearer Dep. 261-65; Wellener Dep. 66; Cirrito Dep. 95-96. If the funds are unclaimed during the statutory waiting period and

are escheated to New York, no interest is due New York if the funds are remitted promptly. N.Y. Abandoned Prop. L. § 511.2. All of the witnesses testified that their firms escheated the "overages" to New York. Cirrito Dep. 93; DeCesare Dep. 152; Principe Dep. 109; Scott Dep. 175; Shearer Dep. 185-86; Wellener Dep. 59-61. Thus, any interest earned during the waiting period inured to the benefit of the holder.[34]

These fairly obvious factual errors in the Report are then compounded by its failure to give the words used in the *Texas* rule their ordinary meaning; the Report instead concludes that the Court's use of the terms "debtor" and "creditor" was "descriptive—an attempt to identify the relevant parties."[35] The Report therefore concludes that

[34] The Report also exhibits a confusion between assets and net worth. It is claimed that the intermediaries do not possess an asset "that would properly be reflected on a balance sheet in the sense of being a positive factor in establishing the intermediary's corporate worth." Report 26. But an asset is no less an asset because its acquisition is accompanied by a countervailing liability and does not increase net worth. The existence of a countervailing liability does not mean that the asset is not an asset. If one deposits $100 in cash in a bank, the bank's cash assets increase by $100 and its deposit liabilities increase by the same amount, so that there is no increase in its net worth. But after the deposit the cash is an asset of the bank, and conducting such matching transactions is a principal part of a bank's business.

[35] Report 29. This reasoning is peculiar. Clarity in identifying the relevant parties is promoted by using their actual names—"Sun Oil"; "Western Union," etc. (*see* Fed. R. App. P. 28(d)); words describing the parties' legal relationships tend to be more useful in setting down generally applicable rules, so that those who must apply the rules need not search for other relevant attributes. Indeed, in *Texas* v. *New Jersey*, the Court described the parties in just that way—identifying them by name until it came time to evaluate the four "different possible rules" to be applied to "intangible property, such as a debt," 379 U.S. at 677-78, at which point the Court switched from the parties' names to the general words "debtor," "creditor," and "state." In stating the generally applicable rule, the Court used the words that described the parties' legal relationships—not their "relevant attributes"; unless one views the "relevant attributes" as that of being a "debtor" and a "creditor."

the Court did not intend the words to have their ordinary meanings, but instead "intended . . . to ask future courts (and Special Masters) to search for parties with relevant *attributes* . . . of the parties denominated 'creditors' and 'debtors' in these two opinions." Report 30 (emphasis in original). By declining to give the word "debtor" its ordinary meaning, the Report creates an unnecessary ambiguity; it then asserts that the ambiguity may only be resolved with resort to a so-called "tie-breaker"; and it concludes by intuiting which interpretation of the word would be more "fair." Report 35.

This approach suffers from a number of flaws. First, and most simply, it violates the letter and spirit of the *Texas* rule and the fundamental legal principles that gave rise to it. Second, it improperly ignores state law. Finally, the various technical justifications given by the Master and others for this departure from precedent are unavailing.

1. *The "Issuer as Debtor" Recommendation Violates the Rule of* Texas v. New Jersey *and Contravenes the Legal Underpinnings of the Doctrine of Escheat*

(a) *Texas* v. *New Jersey* demands two elements: a known "debtor," who owes the money or property; and a "creditor"—who is either "known" but "lost" (under the primary rule) or "unknown" (under the backup rule)—to whom the debtor owes the money or property but cannot pay it. The backup rule provides a simple, clear, black-letter rule for governments and businesses to live by: "if [the creditor's last known] address does not appear on the debtor's books or is in a State that does not provide for escheat of intangibles, then the State of the debtor's incorporation may take custody of the funds." *Pennsylvania* v. *New York*, 407 U.S. at 210. Based on this clear, black-letter rule, 45 jurisdictions have joined together in the Unclaimed Property Clearing House, with an agreement interpreting "debtor" as "holder" in the

context of the backup rule, and have organized computer programs and other systems to carry the rule into practice.

The Report makes a simple inquiry complicated. Rather than looking to the current debtor, the Report "interprets" the rule by purporting to discover that the "debtor" under the *Texas* rule actually means "*former* debtor." But the usual definition of a "debtor," in both ordinary and legal usage, is someone who—in the present tense—owes something to another. *See* Webster's Third New International Dictionary 583 (1986) (defining "debtor" as "one owing money to another"); Black's Law Dictionary 404 (6th ed. 1990) (defining "debtor" as "[o]ne who owes a debt to another who is called the creditor; one who may be compelled to pay a claim or demand; anyone liable on a claim, whether due or to become due," and quoting the definition in U.C.C. § 9-105(1)(d), "the person who owes payment or other performance").

The holders in this case meet the usual definition of a "debtor"—they owe the distribution in their hands to the creditor, whose identity is not known. It is not surprising that the widely adopted uniform acts recognize that the "holder" of the unclaimed property (the one with the obligation to hand it over to the escheating state) is the "debtor" under the *Texas* rule. *See supra* p. 10. Indeed, the official commentary to Section 3 of the 1981 Uniform Act states that in *Texas* v. *New Jersey* "[t]he Supreme Court ruled that, when property is owed to persons for whom there are no addresses, the property will be subject to escheat by the state of the holder's domicile." 8A Uniform Laws Ann. 634 (1983). And all agree that under relevant state commercial and corporation law and practice (adopted and recognized by all 50 states and the District of Columbia), the issuer is neither a "creditor" nor a "debtor" at the time of escheat regarding the dividends and interest that, as here, have found their way into the hands of a recordholder (or a participant in a depository recordholder): once an issuer has made a

distribution to the recordholder of the security, the *issuer* no longer has any right or interest at all in the distribution; and having discharged its obligation by paying the recordholder, it is certainly not a "debtor." *See infra* pp. 37-39.

The Report's recommendation actually requires the word "debtor" to carry different meanings for purposes of the primary and backup rules in the context of the situation involved in this case. To implement the primary rule, which is that property is subject to escheat "only by the State of the last known address of the creditor, as shown by the debtor's books and records," *Texas* v. *New Jersey*, 379 U.S. at 682,[36] one must look to the "holder's" books and records for a lost creditor with a last-known address. The person to whom the *holder* may be owing the funds would not be shown by the *issuer's* books and records; the issuer's records in these situations would show only a depository, broker or bank which has been paid. But once it is determined that the "primary rule debtor" (here, the holder) shows *no* last-known address for the creditor, the Master then stops viewing the holder as "debtor" and the issuer then becomes the "debtor" for the purposes of determining the application of the backup rule. Thus, one must read the *Texas* and *Pennsylvania* cases as using the word "debtor" in different senses in the same opinion[37] or in the same paragraph,[38] if one follows the Master.

(b) The *Texas* rule was not drawn out of thin air. It was the culmination of a long line of cases defining the limits of a state's power to escheat. *See supra* pp. 2-6. By failing to consider these cases, the Report's recommendation exceeds those limits.

In his call for a "lawyerlike definition of state power over this subject," Justice Jackson summarized "[t]he

---

[36] For almost identical language, see *Pennsylvania* v. *New York*, 407 U.S. at 210.

[37] *Texas* v. *New Jersey*, 379 U.S. at 677, 679, 681.

[38] *Pennsylvania* v. *New York*, 407 U.S. at 210.

two usual examples of escheat [that are] properly incidents of sovereignty":

> First, sovereignty in the sense of actual dominion over the property escheated. . . . The right to appropriate intangible property constructively within the state . . . has been upheld by this Court . . . . Second, sovereignty over the person, as a resident or citizen, will justify the state in stepping into his shoes as claimant of abandoned property.

Connecticut Mut. Life Ins. Co. v. *Moore*, 333 U.S. at 560-61 (Jackson, J., dissenting).[39]

Justice Jackson thus synthesized the two sources of a state's power to escheat: power to step into its citizen's shoes as a claimant, and power to seize funds from a person subject to its jurisdiction. The *Texas* rule does not supplant these principles; it builds on them, providing a framework for the states to exercise their escheat power within the limits imposed by their status in our federal system as coequal sovereigns and by the Due Process Clause. The primary rule allows the last known sovereign to step into the creditor's shoes and claim the funds for her. The backup rule allows the state where the intangible property is constructively located to claim it if no appropriate sovereign can be identified under the primary rule.

Under the Report's recommendation, however, neither the primary rule's state—which steps into the shoes of the *creditor*—nor the backup rule's state—which exercises constructive dominion over the *debt*—is allowed to escheat. Instead, a third state—with no relationship whatever to the holder of the funds or to the lost claim-

---

[39] For background, see Note, *Origins and Development of Modern Escheat*, 61 Colum. L. Rev. 1319, 1319-23 (1961); Ray H. Garrison, *Escheats, Abandoned Property Acts, and Their Revenue Aspects*, 35 Ky. L.J. 302, 302-04 (1947); *Anderson Nat'l Bank* v. *Luckett*, 321 U.S. at 240; *Late Corp. of the Church* v. *United States*, 136 U.S. at 56-57.

ant—has priority. Thus, as long as the rule under state law is that the issuer is not a "debtor," it would appear to go beyond the traditional limits of the Due Process Clause to permit the state in which the issuer is located, but where the state-law debtor is not, to escheat in an "owner/address unknown" situation. Where a state, under its own laws, is not a place where the "debt" (that is, the "debtor") is located, or a state where the creditor (as per her last-known address) is located (since the identity of the creditor or her address is unknown) there might be no connection at all between the escheating state and the holder of the funds.[40] To be sure, the states might amend their corporation laws to provide that payment by an issuer to the record owners does *not* discharge the issuer's obligations, and the due process limitations thus might be overcome (assuming that the corporate domicile rule remains intact); but that is not the law today, and surely the disastrous effect of such a rule on corporations and municipal issuers would dissuade most legislatures from adopting it. Accordingly, serious substantive due process concerns are implicit in the Master's recommendation on this score—concerns that appear insurmountable if both rule changes are adopted.

In personam jurisdictional due process issues also suggest that the rule recommended by the Master is so extraordinary as to be suspect. Under the Report's recommendation, a state making claim to the property at issue might have no contacts whatever with the holder.

---

[40] *National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 554 (1977) (Due Process Clause requires some "nexus" between out of state seller of goods and state imposing sales and use taxes); *National Bellas Hess* v. *Department of Revenue*, 386 U.S. 753, 756 (1967) ("'some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax'") (quoting *Miller Bros.* v. *Maryland*, 347 U.S. 340, 344-45 (1954)); *State Bd. of Ins.* v. *Todd Shipyards*, 370 U.S. 451, 455 (1962) (Due Process Clause precluded Texas' taxation of insurance premiums where "only connection between Texas and the insurance transaction is the fact that the property covered by the insurance is physically located in Texas").

In such a situation, the Master conceded that the holder would be protected from being sued in the courts of the state claiming the right to escheat under *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), and *Shaffer* v. *Heitner*, 433 U.S. 186 (1977).[41] The Report, however, observes that "nothing in those [recommended] rules would prohibit the state of incorporation from suing in the courts of the state where the unclaimed property was located." Report 69.

That response reveals just how dramatically this proposal would cut the doctrine of escheat away from its roots and impair the ability of states to enforce their escheat laws. Creating a regime in which states were required to resort to the courts of sister states would be an unseemly derogation from the independence afforded to coordinate sovereigns in our federal system. *See Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971) ("no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not reality, of partiality"). It would also unduly burden escheat collection. It is no answer to say that—*with permission*—a state might be able to collect escheatables in a sister state's courts.[42] In order to ensure compliance with their escheat

---

[41] Report 69; *see also* Report of John F. Davis, Special Master, *Pennsylvania* v. *New York* (November 1971) at 18-19 (confronting the "serious question as to the legality of cutting off or impairing an individual's property rights by an *in rem* proceeding" in a "forum having no continuing relationship to any of the parties to the proceeding"). The Court did not need to resolve the Master's "doubts as to the constitutionality of the alternative formulas for escheat" (*id.* at 20) because it was presented with no good reason to "carv[e] out an exception to the *Texas* rule." 407 U.S. at 214.

[42] We may pass over, for these purposes, whether states would be *required* to open their courts to the enforcement authorities of sister states. *See* Restatement (Second) of Conflict of Laws § 89(b) & Reporter's Note, Taxes (1967) ("it is an 'open question' whether a State is under constitutional compulsion to enforce the revenue laws of a sister State") (citing *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268, 275 (1935)).

regimes, most states also impose penalties for failure to comply.[43] And no state is required to enforce another's penal laws. *Huntington* v. *Attrill*, 146 U.S. 657, 669 (1892); Restatement (Second) of Conflict of Laws § 89 (1967). Under the Master's proposal, the states would thus be left with the prospect of sending attorneys throughout the nation to pursue recalcitrant holders of escheatables without the incentive of penalties for noncompliance.

2. *The Report's Justifications for Its Departure from Ordinary Law and Practice Are Without Substance*

(a) Under well-established and universally-accepted state law and practice, the issuer is neither a creditor nor a debtor once it has paid dividends or interest to the recordholders. Instead, the holder of the unclaimed property, with no obligation to return it to the issuer, is the "debtor."

First, the issuer is not the nominee holder's "creditor." The brokers, banks and depositories here involved are not in any way agents of the issuer acting on its behalf. Rather, the issuer makes distributions to them as record owners, who are fully entitled to the distributions.[44] Once a distribution is made, the issuer has no contractual or legal right to its return.[45] The evidence in this case confirms that these institutions do not act as agents for issuers. Indeed, DTC, the largest depository, stated that it acts "for the benefit of its users or Participants, *not*

---

[43] *See* Egon Guttman, *Modern Securities Transfers* ¶ 16.06, S16-2 to S16-29, col. 10 (3d ed. Cum. Supp. 1991).

[44] Alternatively, another holder—a depository—makes a distribution, based on its record, to its participants.

[45] At oral argument before the Master, no counsel disputed this point, though the Master asked it of all. Transcript at 12, 37, 44-47, 87, 95-96 (Feb. 14, 1991). The only exception, of course, is the case of errors by the issuer's paying agent. *See* DeCesare Dep. 140-41, 270.

a depository acting as an agent for issuers." DTC Statement (emphasis in original); *see* DeCesare Dep. 263-64 (issuers do not reimburse DTC for expenses). Its contracts with issuers confirm that it is acting in behalf of its Participants rather than issuers. *See* DTC Ex. 4. Similarly, the stockholders' and banks' contracts with their customers confirm that it is the customers—not the issuers—who are their principals. *See, e.g.*, Tucker Exs. 2, 3; Merrill Lynch Ex. 2; Prudential-Bache Ex. 6; Citibank Ex. 6. No nominee record owner ever returns properly-paid distributions to an issuer.

Second, the issuer is not a "debtor" of the beneficial owner or anyone else once it has paid the record owner. The use of record ownership—as distinct from beneficial ownership—is "universally accepted in the United States." 2 Model Business Corp. Act Ann. § 7.07, at 568 (3d ed. 1991). References to "shareholder" in the corporation laws of substantially all the states are defined as references to the recordholders.[46]

The Uniform Commercial Code, effective in every state and the District of Columbia, allows the issuer to "treat the registered owner as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner." U.C.C. § 8-207(1) (App. A pp. 23a-24a). This right extends to the payment of dividends and other distributions. The debt created by the declaration of a dividend is discharged by payment to the record owner, and the issuer will not be liable to the beneficial owner on account of such payment. The Report acknowledges this. Report 25 (quoting 1990 Com-

---

[46] The relevant statutes are listed in Appendix D at pp. 86a-89a. *See, e.g.*, Tex. Bus. Corp. Act Ann. art. 1.02(A)(15) (West 1980) (shareholder means "the person in whose name shares issued by a corporation are registered at the relevant time in the share transfer records maintained by the corporation"); Ala. Code § 10-2A-2(13) (1987) (shareholder means holder of record); Cal. Corp. Code § 185 (1990) (same). Only Massachusetts does not define shareholder.

mentaries of the Permanent Editorial Board to the Uniform Commercial Code, PEB Commentary No. 4).[47]

Finally, commercial practice is fully in accord with these principles. Thus, for instance, debt securities routinely include provisions confirmatory of the issuer's rights in U.C.C. § 8-207. One authoritative source suggests a provision reading:

> The Company, the Trustee and any agent of the Company may treat the person in whose name this Debenture is registered as the absolute owner hereof for all purposes whether or not this Debenture be overdue, and neither the Company, the Trustee nor any such agent shall be affected by notice to the contrary.

American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* § 2.2 at 134 (1986).

(b) The Master (and the Intervenors) do not deny any of this. They do, however, offer several technical and metaphorical reasons for ignoring it:

First, the Report contends that the role of record owners and other nominee holders should "mirror the (undiscussed) handling of the agents or intermediaries in *Texas* v. *New Jersey*—they become (almost) transparent." Report 37. The Report thus makes a fundamental error: it treats the paying agents and banks holding funds on behalf of Sun Oil in *Texas* v. *New Jersey* as if they were the same as recordholders. *See also id.* at 18 n.15.

---

[47] *See, e.g., De Anda* v. *De Anda*, 662 S.W.2d 107, 109 (Tex. Ct. App. 1983); *Cooper* v. *Citizens Nat'l Bank*, 267 S.W.2d 848, 853 (Tex. Ct. App. 1954); *In re DePew's Estate*, 41 N.Y.S.2d 19, 27 (Surr. Ct. 1943); *Garvy* v. *Blatchford Calf Meal Co.*, 119 F.2d 973, 975 (7th Cir. 1941); *see also* 12 Charles R.P. Keating & Gail O'Gradney, *Fletcher Cyclopedia of the Law of Private Corporations* § 5504 (1985 rev. ed.); 7 E.F. White, *Thompson on Corporations* § 5323 (2d ed. 1927). The notion that this provision is merely an "affirmative defense" is completely irrelevant. It is true that, in *any* action on a debt, a defense of "payment" must be pleaded affirmatively. *See, e.g.*, Fed. R. Civ. P. 8(c). But "payment" is a substantive discharge of the liability.

Wherever located, paying agents and banks are required to return unpaid money to their principals, either by contract or common law principles of agency. *See, e.g.*, Wellener Dep. 57-64, 92-94, 145-48; Citibank Ex. 3 at C156 (describing typical contractual provision). Paying and transfer agents are, in corporate practice, agents of the company; they keep the company's stock records; they disburse, on behalf of the company, the cash or shares to which the holders of record of the company's securities are entitled. The cash is provided them by the company, and, as to stock dividends, the company gives the transfer agent and registrar an order to authenticate, countersign and distribute new issues of stock by way of a stock dividend. Wellener Dep. 17-18, 55-57, 69-72; Citibank Exs. 2, 3; *see generally* Egon Guttman, *Modern Securities Transfers*, Chapter 9 (Issuer and Its Agents) (3d ed. 1987). DTC is not a paying agent. The discovery in this case confirms that *paying agents* (unlike nominees) return unclaimed distributions *to the issuer*. Wellener Dep. 58, 93, 130.

That is the reason why Sun Oil's paying agents were ignored in *Texas* v. *New Jersey*.[48] The brokers and other holders here, in contrast, do not act for the issuer. It is not the issuer's money that they hold; indeed, their claims to the money are good against the whole world, save the beneficial owner [49] or the escheating state.

---

[48] If the paying agents in the *Texas* case had any creditor, it was Sun Oil itself; but Sun Oil in turn was a "debtor" of the "lost" or "unknown" persons to whom it owed the funds. It was this as certainly as if it had kept the funds it owed these people in currency in its office desk drawers. The fact that Sun Oil, in a normal fashion, kept the money in banks does not affect the fact that it was the "debtor." It did not discharge its debts by putting money for them into its bank account. By contrast here, by paying the recordholders, the issuers discharge their debts.

[49] Good against the beneficial owner also if the holder is owed margin debt by the beneficial owner.

Second, the Report substitutes metaphors for legal reasoning. The process is said to be a "continuum"; the holders are mere "intermediaries" or "conduits" of the money. But all holders of cash are "conduits." That is the nature of money—it passes from one hand to another. The nominee system's purpose is *not* to promote the distribution of dividends, *see supra* pp. 13-17, but nominees still must make distributions; and they do so as obligors to their participants or customers. The Report also considers nominees "bailees" as to the distributions. Report 28. The term "bailee" might be descriptive of someone holding a sheaf of currency in his briefcase, but what is involved here is money which is kept in bank accounts and, indeed, used in the business of the depositories and brokers holding it. What is involved is a set of relationships between "creditors" and "debtors."

If they demonstrate anything, these metaphors demonstrate only the Report's inconsistency with *Pennsylvania* v. *New York*. Indeed, the Report acknowledges that Western Union was *more* of an "intermediary" than the holders are in this case. Report 36 & n.34. Yet, in that case, when the backup rule applied, it was the "intermediary's" state that was permitted to escheat. If the Master's reasoning in this case had been applied to *Pennsylvania* v. *New York*, then the "debtor" would have been the *sender*, or "originator" of the money. It was not. Senders—like payees—were "creditors" of Western Union; their states were entitled to claim where there were addresses and the *primary* rule could apply.

(c) The Intervenors also made several technical arguments in support of their "interpretation," although even the Master does not embrace these. *First*, they pointed to Section 7.23 of the Model Business Corporation Act ("MBCA"), which was introduced into the text of the MBCA as part of the overall 1984 revision of the Act, as a successor to an amendment to the 1969 version of

the MBCA, promulgated in 1973.[50] Like its predecessor, Section 7.23 allows (but does not require) a corporation to "establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder."[51] This provision is irrelevant here. It is wholly optional upon the issuer (*and* the beneficial owner, who must "opt in"). Despite the fact that these provisions have been on the books in at least some states for close to twenty years, there is no evidence in the record that any of them have been used at all by *any* publicly-held corporation in connection with the distribution of dividends or interest. The reason is obvious: the issuers wish to discharge their obligations of payment of dividends and interest in a way which is convenient and certain and which minimizes the chance that they will have to pay twice. By employing the historic system, reflected in U.C.C. § 8-207(1) and in the statutes to which Section 7.23 is a permissive exception,[52] issuers can discharge their obligations by paying the record owners. Having done so, they are free of any claims except such as may arise from the issuer's fault, or its transfer agent's fault, in not properly posting transfers to its record.

Second, the Intervenors pointed to SEC information and proxy rules designed to allow communications between issuers and beneficial owners. SEC Regulations 14A and 14C, 17 C.F.R. §§ 240.14a-1 to 240.14c-101. But

---

[50] *See* Section 2(f) of the 1969 MBCA, revised provision, published in *Changes in the Model Business Corporation Act*, 29 Bus. Law. 947 (1974). Between statutes based on old Section 2(f), as revised, and those based on Section 7.23 of the 1984 MBCA, thirty jurisdictions authorize such a procedure. 2 Model Business Corp. Act Ann. § 7.23 at 619-21 (3d ed. 1991). Section 7.23 is at App. A p. 28a.

[51] The Official Comment notes that "[t]raditionally, a corporation recognizes *only* the registered owner as the owner of shares." 2 Model Business Corp. Act Ann. § 7.23 at 617 (3d ed. 1991) (Official Comment). (Emphasis supplied.)

[52] *See supra* p. 38 n.46; Appendix D at pp. 86a-89a.

these rules have nothing to do with dividends. Under these rules, banks and brokers: (1) on request, for a fee, must provide issuers lists of beneficial owners who do not object to disclosure of their identities and positions, 17 C.F.R. §§ 240.14b-1(b)(3)(i), 14b-2(b)(1)(i), 14b-2(b)(4)(ii), 14c-7(b); and (2) must transmit shareholder communications such as annual reports and proxy materials to beneficial owners. 17 C.F.R. §§ 240.14a-7, 14a-13, 14b-1(b), 14b-2(b)(3), 14c-7.[53] App. A pp. 53a-75a.

The first identified portion of these rules, under which issuers may request lists of "non-objecting beneficial owners" ("NOBO's"—not objecting, that is, to disclosure of their identities), is designed to let issuers communicate directly with beneficial owners. The record indicates that actual use of that portion of the rules for issuers to communicate directly with owners who are not of record is highly limited; in most cases the issuers simply send a requested quantity of shareholder communications to the banks and brokers who redistribute it to their customers.[54] But even if one is to assume that there is substantial direct communication from issuers to beneficial owners under these rules, the rules' silence as to *dividends* speaks volumes. The incremental cost of bulk transmission of shareholder communications is nominal, and "overages" in

---

[53] Similarly, in the context of such communications, DTC's procedures "preserve the depository's transparency as an element in the chain of communication between corporate issuers and their beneficial owners of their securities." DTC Ex. 17 at 3. On the other hand, the depositories are completely untransparent with respect to the payment of distributions. *See* DeCesare Dep. 470-74.

[54] The Senior Vice President for operations of Prudential-Bache characterized direct mailings by issuers to brokerage-house customers as "rare." Cirrito Dep. 52. An operations officer for Citibank, the only bank custodian whose deposition was taken, also characterized it as "rare" as to Citibank's custodial customers, did not realize that the bank was under any obligation to provide the customers' identities, and apparently had never heard of the term "NOBO." Scott Dep. 123-24.

such communications—the result of double mailings—do not result in escheatable property. If the issuer sends a few hundred too many proxy statements or annual reports to the nominees on its "position list," [55] or if it happens to use the NOBO rules and directly sends mailing pieces to stockholders who are also receiving them from their brokers, it has lost very little. Extra annual reports are "publicity" and may be distributed on a complimentary basis; dividends are not. No provision of the present legal system, state or federal, requires issuers to distribute dividends or interest directly to beneficial owners whose securities are registered in someone else's name, and the record does not reflect that any issuer does.[56] The reasons are obvious. No issuer is willing to accept "overage" in the distribution of money, as it might be with copies of an annual report or of a message to its stockholders recommending against a hostile tender offer.

Third, the Intervenors say that the funds at issue are not the brokers' funds in any sense, because the brokers must keep them in a special segregated account for the benefit of the unknown owners pursuant to Rule 15c3-3 under the Securities Exchange Act. 17 C.F.R. § 240.15c3-3.

The rule means nothing of the kind. In the first place, Rule 15c3-2 allows brokers and dealers to use their customers' "free credit balances" "in connection with the operation of the business of such broker or dealer," so long as the broker or dealer periodically informs each of its customers that it does so. App. A pp. 75a-76a. Even if the broker does not know the identity of the customer to

---

[55] Depositories are required by the SEC to provide issuers with a list of the holdings of their participants in the issuer's securities, upon payment of a fee by the issuer. SEC Rule 17Ad-8(b), 17 C.F.R. § 240.17Ad-8(b).

[56] Indeed, Vice President DeCesare of the DTC insisted that "the industry would have a serious problem" with bypassing the record-holders and distributing dividends directly to beneficial owners, and that DTC would not be operationally able to accommodate an issuer who wished to do so. DeCesare Dep. 470-74.

whom it owes the money, it can "use the money in its business" (subject to any other pertinent rules), so long as it sends out the periodic notices to all its customers.

The Intervenors seem to rely on Rule 15c3-3(e), the requirement for a "Special Reserve Bank Account for the Exclusive Benefit of Customers." App. A pp. 76a-78a. However, the calculation of the moneys to be kept in the special reserve account (pursuant to the Rule's Exhibit A) (App. A pp. 78a-79a) is not made on a customer-by-customer basis but is made on an overall basis. Moreover, the account need only be maintained to the extent that total credits (such as customers' free credit balances) exceed total debits (such as margin debt owed by customers).[57] Where brokers maintain substantial debits, they are thus free to use much (and, depending on the circumstances, sometimes all) of the customers' "free credit balances" in the general operation of their businesses.

3. *The "Issuer as Debtor" Recommendation Improperly Ignores State Law*

The relationships giving rise to the property at issue here are created by state law, as is the state's power to escheat. Federal law, which operates "on top" of the state-created system, serves two federal purposes here: it protects persons from deprivation of their property without due process; and it minimizes interstate disputes by providing a stable and predictable means of resolving conflict between states. As in any other property regime, it does so best by minimizing any disruption of the underlying state law and by maximizing predictability for those who must rely on it.

One would think that the *Texas* rule, which has proved abiding for nearly thirty years, would be easily applied

---

[57] *Cf.* Cirrito Dep. 78-81. Thus, if a stockbroker had $1 billion in cash credit balances owing by it to wealthy retired persons in the Hamptons, and had extended $1.1 billion in margin credit to traders in Manhattan, there would be no balance whatsoever required in the Special Reserve Account for anybody, even the people in the Hamptons.

to this case. No analysis of "relevant attributes," no "teasing out" of "ambiguities," no "tie-breaker" is needed; well-established, uniformly-applied and easily-understood principles of state commercial, contract and escheat law provide straightforward answers to the questions posed by *Texas* v. *New Jersey*: who is the debtor?; do the debtor's books and records show a last known address?; and, if not, what is the debtor's state of incorporation?

The Report rejects this straightforward approach, insisting that "federal common law" must be different from state law because "[t]here was no reason to believe that the Supreme Court was using these terms ['debtor' and 'creditor'] in any specific state-law sense in its prior escheat opinions." Report 28.

Although the Report acknowledges that federal common law should not "ignor[e] all state law rules,"[58] it proceeds to do just that. Indeed, its conclusion that the state of the *issuer*, rather than that of the *holder*, is entitled to escheat unclaimed funds owed by the holder to unknown creditors ultimately rests on its determination that the federal common law rule need not "track one [*i.e.* the one adopted by all 50 states!] particular manifestation of a state law rule." Report 26. But this case is the classic one for the application of state law to determine who is the "debtor" and who is the "creditor"; it is uniform, it defines the legal rights of the state and private actors involved, and federal policy would be enhanced by its application.

That state law should ordinarily provide the basis for the federal rule is apparent from what Professors Hart and Wechsler have called the "interstitial character of federal law." Henry M. Hart & Herbert Wechsler, *The*

---

[58] Report 25-26; *see Connecticut* v. *Massachusetts*, 282 U.S. 660, 670 (1931) ("For the decision of suits between States, federal, state and international law are considered and applied by this Court as the exigencies of the particular case may require.").

Federal Courts & The Federal System 435-36 (1953).[59] Federal law "builds upon legal relationships established by the states, altering or supplanting them only so far as necessary for the special purpose. . . . [F]ederal law often embodies concepts that derive their content . . . from the states." *Id.* at 436.

In a number of situations, federal law protects rights only to the extent that they exist under state law. Indeed, while the Due Process Clause protects "property" interests, those interests "attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law." *Paul* v. *Davis*, 424 U.S. 693, 710 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972) ("Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings-that stem from an independent source such as state law.").

Thus state law does not merely "inform" federal law for purposes of the Due Process Clause, but "defines" it. So it is in this case. It is only where private property interests are recognized by a state, and, at the same time, more than one state claims the right to escheat or take custody of the property, that the states face a conflict among themselves over which one may claim intangibles. The inquiry thus begins with and is defined by state law. In light of the nature of the federal interests at stake here (which are fully complementary to and derivative from state law), state law appropriately defines the "debtor" and "creditor" relationships—as it defines "property" interests in other cases where a federal right protects or acts upon such interests.[60]

---

[59] This famous passage is now reprinted in the third edition (1988) at page 533.

[60] A myriad of other federal rights are, of course, entirely defined by state law. *See, e.g., Appleby* v. *City of New York*, 271 U.S.

Where federal purposes are best achieved by incorporation of state law, this Court does not hesitate to do so—even in situations where state law is *not* the source of rights under federal law, as it is here. *See, e.g., Board of County Comm'rs* v. *United States*, 308 U.S. 343, 349-52 (1939) (per Justice Frankfurter).

The "appropriate[ness]" of giving "due regard for local institutions and local interests"[61] is at its apex where traditional state interests—such as property rights or the regulation of corporations—are at issue. The Court is, in fact, reluctant to "federalize" the common law in areas traditionally regulated by the states, like corporation law and property law. Rather, the Court will incorporate state law into the federal rule, even if state law does not operate *ex proprio vigore*. *See, e.g., Kamen* v. *Kemper Fin. Servs.*, 111 S. Ct. 1711, 1717 (1991) ("The presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards.").[62]

Most recently, this Court confirmed that "[i]n the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law." The Court therefore looked to the Uniform Commercial Code for determination of whether and when transfers of "property" occurred for purposes of federal bankruptcy law. *Barnhill* v. *Johnson*, 112 S. Ct. 1386, 1389 (1992).

364, 380 (1926) (Contract Clause); *Ford* v. *Ford*, 371 U.S. 187 (1962) (Full Faith and Credit Clause).

[61] *Board of County Comm'rs*, 308 U.S. at 361.

[62] *Accord Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977) ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States. 'The great body of law in this country which controls acquisition, transmission, and transfer of

Here, no federal interest calls for the creation of new federal rules as to who is a debtor to be developed on a "case-by-case" basis; indeed, the opposite is true. *Texas* v. *New Jersey*, 379 U.S. at 679. Even if state laws were not uniform (as they are here) we submit that the federal law of escheat should still build upon the laws of the various states and apply to whoever was a debtor or creditor under those laws. But here the pertinent state law is exactly the same in all 50 states. To propose a federal common law that varies from *uniform* state law would appear to add a "big brother" element to analytical error.

4. *"Fairness" as a "Tie-Breaker"*

With the technical rationale of the Master's recommendation put aside, as we submit it must be, the Master's recommendation amounts to an intuition that the rule contended for by Texas is "as a matter of fairness" preferable. Report 35.

The "fairness" conclusion is reached essentially in populist terms—that it would be best to send the money back where it came from. Doing this was said to be

---

property, and defines the rights of its owners in relation to the state or to private parties, is found in the statutes and decisions of the state.'") (quoting *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 155 (1944)); *Callaway* v. *Benton*, 336 U.S. 132, 138-39 (1949) (state law, not federal law, determines rights of shareholders to vote on corporation's reorganization plan); *see also Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 557-79 (1985) (Powell, J., dissenting) (arguing for limits on powers of Congress and emphasizing the "need to protect traditional [state] governmental functions").

Even where rights traditionally regulated by the states are not at issue, "the municipal law relating to like questions between individuals is to be taken into acount, [although] it is not deemed to have controlling weight." *Connecticut* v. *Massachusetts*, 282 U.S. at 670 (water rights between states). Here, the Report gives no weight at all to state law.

"particularly appealing in the case of unclaimed payments on municipal obligations." Report 35. In essence, even though the state has, for example, borrowed $10 million and owes a three percent semiannual payment on its bonds, once it pays its recordholders the $300,000 in question, it is entitled to a discount should some of the money not find its way into the pockets of the beneficiaries, or should some person receive more than his share. The fairness of giving the money back to the issuing state or to the state in which an issuing municipality is located in such a situation is hardly evident.[63] It hardly seems fair to reverse some of a debtor's obligations simply because a breakdown has occurred in the distribution chain after the debtor has discharged its debt by paying the recordholders. It could be argued with some force that the case where the issuer is the state is, from a legal standpoint as opposed to a populist one, the least appealing case for the application of the Master's rule.

The argument of "send it back where it came from" has been heard in this Court before. The Report claims that its recommendation

> is more consistent with the precedent to support escheat (or custodial taking) by the jurisdiction that was connected with the entity that was the originator of the transaction (or the original owner of the funds) over the jurisdiction that was connected with the entity that simply holds the funds at the time no further distributions are possible.

Report 38. This very premise was put forward by the State of Texas in *Texas* v. *New Jersey*: "Texas argues in particular that at least the part of the intangible obligations here which are royalties, rents, and mineral pro-

---

[63] The Report's more frank recommendation for a change in the applicable law, to determine, as to corporations, the domiciliary state by reference to a test other than the state of incorporation, seems to be based on an effort to apply the Master's same notions of "fairness." *See* Report 35 n.32; Part B, *infra* pp. 61-69.

ceeds derived from land located in Texas should be escheatable only by that State." 379 U.S. at 679 n.9. The Court rejected Texas' proposed "exception to [the] general rule concerning escheat of intangibles." *Id.* Here, the Report has taken an "exception," not then permitted by the Court, and turned it into the general rule—since the intangibles originate from a state unconnected with the holder, the Report posits that the "originating" state is entitled to escheat.[64]

---

[64] In addition, this "policy" operates from a false premise—that the issuer is necessarily the "originator of the transaction." Often the issuer is, itself, a "conduit." Mutual funds are the most obvious example. The dividends (as opposed to capital gains distributions) that they pay are derived entirely from the dividends and interest they receive on their portfolio securities. The same is the case with "closed-end" investment companies, whose stock is often listed on securities exchanges. Almost 10 percent of U.S. corporate stock is held by mutual funds. *See Flow of Funds* at 44. Since, under the Investment Company Act, mutual funds and closed-end investment companies generally use bank custodians, Investment Company Act of 1940, § 17(a)(1), 15 U.S.C. § 80a-17(a)(1), their portfolio holdings are included in the overall figures as to the percentage of corporate stocks held by nominee intermediate holders.

Other examples of the "issuer as conduit" abound. One of the leading securities phenomena of the 1980s was the growth of Collateralized Mortgage Obligations ("CMO's"). *See* Michael Lewis, *Liar's Poker*, at 103-51 (1989). The current volume of these obligations outstanding is $1.1 trillion, *Flow of Funds* at 46. These obligations consist of undivided interests in pools of residential mortgages. The underwriters for these obligations frequently seek geographic diversification of the pools to make them more marketable. *See* Kenneth G. Lore, *Mortgage Backed Securities* at 3-14, 9-22 (1991 ed.). The trust in which the mortgage obligations are placed is the "issuer." To treat the issuer trust as the "debtor" and to send the escheated funds to the state of the trustee on the theory that one is "sending the funds back where they came from" is ludicrous in the CMO situation. In addition to CMO's, issues of other securitized receivables are now common, including pass-through securities involving car loan receivables, general credit card receivables, and the like. *See* William W. Bartlett, *Mortgage Backed Securities* 44 (1989). The Master's theory completely ignores and breaks down on securities such as these.

At bottom, the Master's recommendation appears to be for an alteration, not an application, of the rules established by this Court. It is one that proceeds from principles that, even if meritorious, ought, institutionally, to be implemented by Congress in making an exception to the rules—as it did in the money order situation—rather than by this Court.

B. The Master's Recommended "Modification" of the Backup Rule to Replace the State of Incorporation with the State of Principal Executive Office Must Be Rejected

The backup rule provides that if the creditor is unknown or its last known address cannot be found, "the State of the debtor's incorporation may take custody of the funds." *Pennsylvania* v. *New York*, 407 U.S. at 210-11. The Report urges the Court to discard this rule and substitute "the jurisdiction of the entity's principal domestic executive offices." Report 49. No party sought this departure from the *Texas* and *Pennsylvania* backup rule until the Master, *sua sponte*, suggested it in his draft report.[65] Although the Texas group of Intervenors did not suggest the change, opportunism soon prevailed, and they now embrace the Master's desire to leave by the wayside the "salutary rule of *Texas* v. *New Jersey*" (Brief of *Amici* at 10).

The Report recommends that this Court, in a way which the Report claims is "minor," depart from the doctrine of *stare decisis*. We discuss later the constraints of *stare decisis*, which are involved both on this point and in the Master's unacknowledged change in the backup rule—declaring the "issuer" to be the "debtor." For the moment, we note that the Report does not suggest, within

---

[65] The Master also denied Delaware's request for discovery and an opportunity to demonstrate the detrimental effects of the proposed change; he considered such inquiry to be "pointless." Discovery Order No. 15 (Jan. 28, 1992) at 1.

the framework of this Court's decision in *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173 (1989), that there has been any intervening development in the law or any confusion created by an unworkable decision. Instead it seems to rest solely on an implicit suggestion that the holding in the *Texas* and *Pennsylvania* cases has become "outdated and after being tested by experience, has been found to be inconsistent with the sense of justice or with social welfare." *Patterson* v. *McLean Credit Union*, 491 U.S. at 174 (internal quotations omitted).[66] But even here the Master's discussion does not establish that continued application of the "state of incorporation" rule is inconsistent with the sense of "justice" or with "social welfare."

1. *Intervening Developments in the Law Fully Comport with* Texas v. New Jersey's *Corporate Domicile Rule*

In *Texas* v. *New Jersey*, the Court rejected the rule the Master now recommends (albeit in a slightly different permutation). 379 U.S. at 680. The Report points to no development in the law that has "removed or weakened the conceptual underpinnings" of the corporate domicile rule, or that has rendered it "irreconcilable with competing legal doctrines." *Patterson* v. *McLean Credit Union*, 491 U.S. at 173. In fact, the conceptual underpinnings of the rule retain complete vitality.

Even if the Report were correct that the Court's choice of the state of incorporation rule was essentially arbitrary in 1965 (Report 41), it points to no intervening legal developments rendering that choice invalid today. But, like the Report's deconstruction of the word "debtor," its recommendation that this time-honored rule be dis-

---

[66] Whether this is a valid basis for the overruling of a precedent at any time where the matter is one capable of correction by Congress was treated as questionable by the Court in *Patterson* v. *McLean Credit Union*, 491 U.S. at 174.

carded proceeds from a fundamental misunderstanding of the source of the *Texas* rule. The Report erroneously assumes that the backup rule was merely a "*proxy for location*" (Report 41 (emphasis by the Master)). That is not the case. The *Texas* rule developed out of the traditional relationship between a corporation and the state which gave rise to its existence.

The Court's early escheat decisions recognized that a state has power over its corporate citizens holding unclaimed funds to require them to turn such funds over to the state, *Security Sav. Bank* v. *California*, 263 U.S. 282, 285 (1923), and that the power of a corporation's state of incorporation—"jurisdiction over the debtor"—"provides not only the basis for notice to the absent owner but also for taking over the debt from the debtor." *Standard Oil Co.* v. *New Jersey*, 341 U.S. at 439. Such funds are, in Justice Jackson's words, "constructively within the state" (*Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. at 560) precisely because they are possessed by its corporate citizen.

The *Texas* backup rule built on these decisions, allowing the state of corporate domicile to take possession of the funds in situations where the primary rule could not be applied. Since the *Texas* decision, this Court has aptly summarized the state's historical power over its corporate citizens, and the reasons for such power:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence."

CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69, 89 (1987) (quoting *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819)).

And, fundamentally, the *CTS* decision underlined the role of the incorporating state in our corporation-law system: "It thus is an accepted part of the business landscape in this country for the States to create corporations, to prescribe their powers, and to define the rights that are acquired by purchasing their shares. A State has an interest in promoting stable relationships among parties involved in the corporations it charters . . . ." 481 U.S. at 91. The *CTS* decision recognized the incorporating state's unique power to regulate corporate governance in the face of federal legislation claimed to be preclusive of the exercise of that power. *CTS* does not stand alone: other cases decided by this Court and the courts of appeals in the years since the *Texas* case have upheld the powers of the incorporating state, and its legislation, against suggestions that a "federalized" rule should supersede them. *See Burks* v. *Lasker*, 441 U.S. 471, 478 (1979); *Santa Fe Indus.* v. *Green*, 430 U.S. 462, 478-79 (1977); *Cort* v. *Ash*, 422 U.S. 66, 84 (1975); *Sadler* v. *NCR Corp.*, 928 F.2d 48, 53-54 (2d Cir. 1991); *Business Roundtable* v. *SEC*, 905 F.2d 406, 412 (D.C. Cir. 1990) (invalidating SEC's one share/one vote rule because it would "impinge severely on the tradition of state regulation of corporate law"); *Amanda Acquisition Corp.* v. *Universal Foods Corp.*, 877 F.2d 496, 506-07 (7th Cir.), *cert. denied*, 493 U.S. 955 (1989); *Tyson Foods, Inc.* v. *McReynolds*, 865 F.2d 99, 101-02 (6th Cir. 1989).

While it is true that states *also* have personal and legislative jurisdiction over foreign corporations doing business in the state, the well-recognized and firmly-established relationship between the corporation and its chartering state was, for purposes of the backup rule, chosen by this Court in *Texas* as superior, and nothing has changed to undermine that choice. The escheat of unclaimed funds in the hands of the state's corporate citizens is a natural and well-established function of its sovereign power.

2. *Discarding the Rule of Corporate Domicile Would Be an Administrative Disaster*

The Report's primary justification for its recommendation to jettison the rule of corporate domicile is the "substantial experience with rules that look to the debtor's chief (or principal) executive office." Report 42. The Report in no way suggests that the traditional rule is "unworkable," but mistakenly asserts that its alternative would cause very little disruption to a system that has worked exceptionally well. The Report relies primarily on Section 9-103(3) of the Uniform Commercial Code. App. A pp. 24a-26a. Section 9-103 is a "choice of law" section catch-lined "Perfection of Security Interest in Multiple State Transactions." The particular subsection on which the Master places such great emphasis is § 9-103(3), dealing with "accounts, general intangibles and mobile goods." Other subsections deal with documents, instruments and ordinary goods; certificates of title; chattel paper;[67] minerals; and uncertificated securities. Subsection (3) says that the law of the jurisdiction in which the debtor is "located" governs the perfection of security interests in "accounts, general intangibles and mobile goods," and subparagraph (d) of that subsection says that a debtor is located at "his place of business if he has one, [and] at his chief executive office if he has more than one place of business."

If the Master is attempting to find support by way of legal analogy in this section of the Uniform Commercial Code, it is hard to find much analogy to the securities business in "accounts, general intangibles and mobile goods"; securities are not included in any of these categories. If anyone were to look into Section 9-103 for legal analogies pertinent here, the subsection about "uncertificated securities" might be thought to be more germane. But that subsection (§ 9-103(6)) says that one

---

[67] This is the only subsection that applies the same rules as subsection (3), and that only in certain cases.

looks to the law "of the jurisdiction of organization of the issuer" to determine the perfection of a security interest in such a case. It is surprising that the Master did not refer to this subsection.

We suppose the Master cited U.C.C. § 9-103(3) simply in an effort to demonstrate that the test of "chief executive office" is not unworkable. One might have hoped that there was a better reason for changing a rule than that the new one was not unworkable, particularly since reference to the state of incorporation produces a very workable rule. But the fact of the matter is that § 9-103(3)(d) is hardly an example of "precision and ease of determination." Report 43. The reason that U.C.C. § 9-103(3)(d) has not resulted in tremendous uncertainty has nothing to do with whether it is easy to determine a corporation's "chief executive office." Instead, the uncertainty created by the test under this statute (and acknowledged in the Official Comments to it) is avoided by an option that is simply not available in the escheat context—the expedient of filing duplicate financing statements in more than one state.[68] As Official Comment 5(c) explains:

> The term "chief executive office" is not defined in this Section or elsewhere in this Act. Doubt may arise as to which is the "chief executive office" of a multistate enterprise, but it would be rare that there could be more than two possibilities. *A secured party in such a case may easily protect himself at no great additional burden by filing in each possible place.* (Emphasis supplied.)

---

[68] "The easy answer, according to the Official Comment, is for the lender to file in all relevant states. . . . [W]henever there is doubt, the lender should file in every relevant jurisdiction." C.A. Schipani, *The Lender's Dilemma: National and International Automated Data Complications in Perfecting a Security Interest in Accounts*, 22 New Eng. L. Rev. 273, 282-83 (1987) (footnotes omitted); *see In re Peregrine Entertainment, Ltd.*, 116 B.R. 194, 198 n.4 (C.D. Cal. 1990) (creditor filed in two places).

Cases and commentary confirm the fact-based and subject-to-litigation nature of the "chief executive office" test, which of course may easily be avoided with multiple filings in the U.C.C. context. "The question of where the debtor['s] . . . chief executive office is, will be a factual one, determined by the trier of fact." 8 William D. Hawkland, *et al.*, *UCC Series* § 9-103:09 at 165 (1990). Thus, the courts have employed a multifactor test to determine which office is the "chief executive office." [69] The analogy to multiple filings under the U.C.C., when we move to the interstate escheat situation, is multiple claims and litigation.

In recommending this rule change, the Master may have been tempted by the "principal place of business" test adopted in the 1974 "Western Union" statute, 12 U.S.C. § 2503, and introduced into the Judicial Code in 1958 as one of the two bases of determining corporate citizenship for purposes of the diversity jurisdiction. 28 U.S.C. § 1332.[70] But the "principal place of business" test is a notorious breeder of litigation. In the Section 1332 context, a *Westlaw* search indicates that there are approximately 200 decisions in the district courts and approximately 60 in the courts of appeals construing the language in question. While it may be the case that a "principal executive office" test might engender somewhat

---

[69] *E.g.*, *Mellon Bank, N.A.* v. *Metro Communications*, 945 F.2d 635, 642 (3d Cir. 1991) (factual test not to be applied rigidly), *cert. denied*, 112 S. Ct. 1476 (1992); *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1171 (10th Cir. 1985) (applying various factual criteria); *In re J.A. Thompson & Son*, 665 F.2d 941, 950 (9th Cir. 1982) (same); *Westinghouse Credit Corp.* v. *Rovi Prop. & Mgt. Corp.*, 607 S.W.2d 682, 683 (Ky. Ct. App. 1980); *In re Ericson*, 6 B.R. 1002, 1009 (D. Minn. 1980) (approving settlement because "trier of fact would have some difficult decisions to make"); *In re Astrocade, Inc.*, 31 B.R. 245, 250-51 (Bankr. S.D. Ohio 1983) (listing nineteen factors).

[70] It will be recalled that "principal place of business," used by the Court interchangeably with "main office" and "principal offices," was one of the primary-rule alternatives considered and rejected in the *Texas* case. *See* 379 U.S. at 680.

less controversy than "principal place of business," controversy would remain. Controversies under Section 1332 occur, by definition, where there is already a lawsuit. But in formulating the rules in the *Texas* case, the Court stressed that its choice was motivated by a desire to *avoid* uncertainty and litigation.

The Report acknowledges the uncertainties its test would create, but erroneously asserts that they may be overcome by resort to SEC filings such as Form 10-K, in which the issuer lists a "principal executive office." Report 44. The Report also acknowledges that SEC filings are not an "all-encompassing" solution to the uncertainty created by its recommended test. Report 48. But it considers "a general inquiry [into a corporation's principal executive office] . . . neither burdensome nor complex." Report 49. Of course, one of the bases for rejecting the "principal place of business," "main office" or "principal offices" test in *Texas* v. *New Jersey* was not the *degree* of burden or complexity imposed by the inquiry, but the fact that the inquiry need be made (and litigated in this Court) at all. *Texas* v. *New Jersey*, 379 U.S. at 680.

Even in the context of public corporations filing 10-K reports, administration of a "principal executive office" rule would not be easy. In submissions to the Master, Delaware identified 94 companies that—according to two computer databases with data taken directly from SEC disclosure statements—had more than one principal executive office reported during the same period of time; that number more than doubled when other standard reference sources were included; and we identified 785 companies that changed principal executive offices in the years 1988 to 1991, according to these same standard reference sources. The Report discounted the "judgment calls" that would be made in these cases as not diminishing the "substantial certainty" it asserted would be created. Report 48. But the result of adopting the "principal executive office test"—even in the case of issuers of pub-

licly-traded securities and especially in the case of holders that do not issue such securities—would be hundreds of factual resolutions that would have to be made each year. Referring these cases to Special Masters or District Judges would be a waste of resources.

But the difficulty does not stop there. The Master appears to have confused the contours of this case—which extended only to the confines of the securities business—with the general issues posed by the backup rule. The Master never asks, let alone answers, the question whether his change in the backup rule is to be a general one, applicable in all circumstances, or one limited to the distribution of dividends and interest on publicly-traded securities. There are few, if any, limiting principles in the Master's recommendation on this subject (*see supra* pp. 22-23), but perhaps the Master was planning to leave the question for further litigation in other contexts.

If, however, we assume that the change in the backup rule is to be generally applicable, we will quickly be drawn into waters where 10-K reports, whatever help they may be in any event, will not even be available. Those reports are only filed by issuers of publicly-traded securities. The states collect roughly a billion dollars annually from the holders of *all* kinds of unclaimed property. *See* National Association of Unclaimed Property Administrators, *NAUPA News*, Aug. 1988, 4-5 (fiscal year 1986-87); National Association of Unclaimed Property Administrators, *NAUPA Unclaimed Property Brochure* (fiscal 1989-90). Often these moneys will be held by privately-held corporations or other private business entities. Moreover, a very substantial portion of the states' escheat revenues comes from banks and insurance companies—which are generally structured as subsidiaries of holding companies.[71] Even when these holders are subsidiaries of

[71] Again, the Master did not permit Delaware to make a general record on this point; Delaware, though, receives more than 10% of its escheat revenues from banks and insurance companies.

public companies, they may well have different principal executive offices from their publicly-held parents. *See, e.g., Mellon Bank, N.A.* v. *Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) ("[a]scertaining the location of the headquarters of a wholly-owned subsidiary necessarily differs from determining the location of the chief executive office of a single corporation"), *cert. denied*, 112 S. Ct. 1476 (1992). Banks do not need to file 10-K reports if they are simply subsidiaries of public companies and have not issued securities themselves; neither do insurance companies. In none of these contexts will any 10-K report be available to assist us.

3. *Fairness Demands Retention, Not Rejection, of the Corporate Domicile Rule*

Again, at bottom, the Master's recommendation stems from his particular notions of "fairness," Report 46, and his apparent disapproval of the amount of escheat revenue sought or received by Delaware in this context. This "policy" justification is highly questionable: there is no relationship between the place of a corporation's principal executive office and the benefits derived by its shareholders from the state's laws; and Delaware's preeminence in attracting corporations is not an accident. If a policy change is to be made here, it should be left to Congress.

The Report argues that its "chief executive office" test will be "much more fair" because it "seems calculated to identify the jurisdiction where the benefits are created" and "is more likely to distribute the funds, in this and other cases, fairly among the various jurisdictions." Report 50. Neither policy justification is correct. A state's corporation laws contribute substantially more to the benefits created for shareholders than the Report suggests and the jurisdiction where the "chief executive office" is located contributes much less than the Report contends. Moreover, "fairness" does not mean "spread revenue equally."

(a) *The State of Incorporation Provides Significant Benefits to Shareholders.*—To begin, the Report fails to recognize the tangible benefits provided to shareholders by a state's corporation laws.

Delaware's preeminence in attracting corporations is not based on mere happenstance. It is based on choice—the choice of management *and* shareholders.[72] The benefits of incorporating in Delaware have been the subject of scholarly debate and inquiry. Until about 20 years ago it was fashionable in academic circles to suggest that state corporation laws were involved in a "race to the bottom" and that Delaware's corporation law won that race by favoring management at the expense of shareholders.[73] More penetrating academic analysis followed. It emphasized the cost savings permitted by incorporation in Delaware, which inures to the benefit of shareholders. Thus, then-professor (now Judge) Winter concluded that "[t]he chartering decision, therefore, so far as the capital market is concerned, will favor those states which offer the optimal yield to both shareholders and management." Ralph K. Winter, *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. Legal Stud. 251, 275 (1976). *Accord* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 Nw. U. L. Rev. 913, 919-20 (1982) (Delaware's "permissive corporation law maximizes, rather than minimizes, shareholders' welfare").

In a comprehensive empirical study of corporations that have reincorporated in other jurisdictions, Professor Romano sought to solve the "peculiar puzzle that one state, Delaware, has consistently been the leading choice for reincorporating firms for over fifty years." Roberta Romano, *Law as a Product: Some Pieces of the Incor-*

---

[72] Changing the place of a chief executive office—unlike changing a state of incorporation—does not require a shareholder vote.

[73] *See* William L. Cary, *Federalism and Corporate Law: Reflections upon Delaware*, 83 Yale L.J. 663 (1974).

poration Puzzle, 1 J.L., Econ. & Organization 225, 226 (1985). She concluded that the states compete for corporate charters, and that Delaware is, "with extraordinary consistency, the most sensitive to new ideas," *id.* at 240.[74] Moreover, the choice by corporations to move to Delaware is no coincidence: "the advantages commonly enumerated in the proxy boilerplate of reincorporating firms, such as the ready availability of legal opinions and a well-developed case law, are, in fact, critical, for they can reduce the cost of doing business." *Id.* at 250. *Accord* Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. 469, 484 (1987) ("Probably the greatest benefit that Delaware offers corporations is a highly developed case law that provides not only a useful set of precedents, but also a substantial degree of certainty about legal outcomes.").

For a case study of the balanced nature of the Delaware General Corporation Law, one may look to the 1988 amendment to section 203, known as the Delaware Takeover Statute. The legislative deliberative process took into consideration the views of a broad range of interests, in an effort to achieve a balanced statute. *See generally The New Delaware Takeover Statute* (Practicing Law Institute No. 598, 1988) (containing testimony and commentary on the new statute). The courts have concluded that "[s]ection 203 is an exquisitely crafted legislative response to a variety of perceived problems," and "both promotes stable corporate relationships and protects shareholders." *BNS Inc.* v. *Koppers Co.*, 683 F. Supp. 458, 473 (D. Del. 1988); *accord RP Acquisition Corp.* v.

---

[74] She also observed that "Delaware has an additional mechanism that provides assurance to firms that it will not radically revamp its corporation laws. The state constitution requires that any revision of the corporation code be supported by a supermajority vote (two-thirds) of both houses of the state legislature." *Id.* at 241 (citing Del. Const. art. IX, § 1).

Staley Continental, Inc., 686 F. Supp. 476, 485 (D. Del. 1988).[75]

In short, a state of incorporation can play a significant role in providing value to the shareholders of its corporations, and Delaware does so. That corporations choose it and investors find it an appropriate choice speak volumes.

(b) *The State of "Principal Executive Office" Bears No Particular Relationship in Law or Economics to Stockholder Welfare.*—If the Master had recommended that the "state where the principal business operations of a corporation were located" replace the "state of incorpora-

---

[75] Where a state ignores a balanced approach, it does so at its peril. An interesting case study is the Pennsylvania Takeover Act of 1990, Pa. Sen. Bill No. 1310 (codified in scattered sections of 15 Pa. Cons. Stat.). *See* Robert D. Rosenbaum & L. Stevenson Parker, *The Pennsylvania Takeover Act of 1990: Summary and Analysis* (1990); Letter to the Governor and Members of the General Assembly of the Commonwealth of Pennsylvania from Forty-Two Professors (Jan. 26, 1990) (the Act "represents an unusually troubling development that could inflict significant harm on Pennsylvania corporations and damage the national economic interest") (on file with counsel of record); John Pound, *Shut Up, Shareholders —This is Pennsylvania*, Wall Street Journal, Dec. 13, 1989, at A14, col. 3.

The effort to enact the statute led to institutional investors threatening to vote with their feet. The California Public Employees' Retirement System (CALPERS) threatened to divest itself of all Pennsylvania corporations. Gregory A. Robb, *S.E.C. Chief Criticizes Bill to Thwart Takeovers*, N.Y. Times, Apr. 3, 1990, at D3, col. 1 ("'We will require the fiduciaries to review the wisdom of further investments in'" Pennsylvania corporations) (quoting Dale M. Hanson, Chief Executive Officer of CALPERS). Enactment of the statute proved an embarrassment to a number of Pennsylvania corporations in the light of this attitude on the part of investors. Ultimately, more than 50 Pennsylvania corporations—including some of the largest ones (Westinghouse, Conrail, H.J. Heinz, PNC Financial, PPG Industries, and Sun Oil)—opted out of either all or a portion of the statute's coverage. Justin P. Klein & Jeffrey P. Greenbaum, *Many Pa. Companies Opt Out*, National Law Journal (Mergers & Acquisitions), Sept. 10, 1990, at 15; *Westinghouse Spurns Statute*, N.Y. Times, June 1, 1991, at D2, col. 3.

tion" rule, it might have been thought to have some relation to the economic, governmental and social climate which created the corporation's products or services and hence its wealth. It also would, of course, have been a departure from *stare decisis*, and would have produced an unadministrable rule, breeding as much litigation as that under Section 1332 of the Judicial Code. The Master decided not to do this, and thinking erroneously that the "principal executive offices" rule might be almost as easily administrable as the "state of incorporation" rule, chose it instead. Perhaps he thought that in economic terms the "state of principal executive offices" was like the "state of principal business operations."

But the "principal executive offices" and "principal place of business operations" of a corporation are two entirely different things. The Master may have an antiquated view of corporate life in which the corporation's managers and executives live close to its plants or factory—perhaps in an upscale part of town, but in the same town nonetheless—and work in top floor offices at the plant, looking out the windows at the smokestacks. That image may have been correct decades ago, but it is not correct now. With the increasingly far-flung nature of business operations; with multiple plants and mines for the traditional extractive and manufacturing sorts of business; with physical production often taking place in a variety of nations; with even service businesses employing large, decentralized clerical staffs wherever they can be hired the most cheaply; and with the great improvements in communications and data transmission, the modern executive suite is increasingly located nowhere near what one might find to be the principal center of the corporation's productive work. Indeed, it increasingly is in a free-standing executive office completely detached from the places where the corporation's productive work is done. The Master perceived a connection between the executive offices and productive activity, and he related that connection to "fairness"; but the connection continually grows more attenuated.

Improved communication technologies have resulted in shrinkage of the top executive group and in frequent relocations of its offices "off-site" from productive plants or facilities. *See* Alan Farnham, *Migratory Habits of the 500*, Fortune, Apr. 24, 1989, at 400 ("Technology makes relocation to remote locations more feasible. With the latest advances in telecommunications, a CEO can run his company from the moon"). This technology has also led to widespread decentralization of the corporate decisionmaking process. As David A. Heenan has observed,

> By the 1960s, several factors began to signal the demise of the bigger-than-life head office. . . . For a decade, U.S. firms slashed away at their headquarters staffs and cut deeply into middle management, at times eliminating entire levels. . . .
>
> The recent wave of mergers and acquisitions, takeovers and leveraged buy-outs (called "LBOs") further stimulated the minimalist movement. Breakup prices of a diversified conglomerate were directly tied to the autonomy of its operating companies. Since stand-alone subsidiaries tended to enhance the value of the parent, there was added incentive to shift power and staff away from the head office to the business units.

David A. Heenan, *The New Corporate Frontier: The Big Move to Small Town, USA* 10-11 (1991).[78]

Moreover, there is no sure connection between a corporation's "designated headquarters" and the place where its actual business occurs or even where its actual decisionmaking takes place. "[O]ne's headquarters can be anything one says it is." Alan Farnham, *Migratory Habits*

---

[78] *See also* Robert E. Levinson, *The Decentralized Company* 17 (1983) (describing central features of "radically decentralized" company, including "parent company's role is primarily that of a banker for its operating divisions," and "[d]ecisions are made by hands-on managers ('experts') at the scene rather than by headquarters numbers men ('specialists') far removed from the actual operation.").

of the 500, Fortune, Apr. 24, 1989, at 401.[77] Increasingly, "the single-most important factor in the decision [to relocate the top group's offices] is the arbitrary wishes of the company's chief executive officer." W. John Moore, *Corporate Kidnapping*, National Law Journal, June 13, 1987, at 2. These wishes can be driven by the chief executive officers' personal income tax considerations[78] or "lifestyle" considerations.[79]

Even where executive sybaritism is not the guiding principle, the location of the "principal executive offices" no longer bears any fixed relationship to where the company's operations and productive activities occur. Decisions as to site selection for "principal executive offices" have nothing to do with a determination of whether the

---

[77] Illustrative examples include Borden (1,200 employees in Columbus, Ohio; 25 in New York, where "executive office" is designated); W.R. Grace (bulk of former headquarters staff moved to Boca Raton, Florida; "corporate headquarters" in Manhattan with staff of 20 to 50); Louisiana Pacific (corporate headquarters in Portland, Oregon; most operations located in south and south-west); Grumman Corporation (will maintain New York headquarters even though "major operations [located] elsewhere"); Medi-Mail Inc. (bulk of operations moved from San Diego to Las Vegas; six employees at corporate headquarters in San Diego). *See* Del. Supp. Br. (Nov. 5, 1991) at 10-11.

[78] *See* Katherine Barrett & Richard Greene, *Snow White and the 50 Dwarves*, Financial World, Apr. 17, 1990, at 1 ("more often than anyone wants to admit, the decision to move headquarters involves a $5,000 hit in personal taxes on the part of some CEO").

[79] *See* Alan Farnham, *Migratory Habits of the 500*, Fortune, Apr. 24, 1989, at 400 ("golf in January" is the "clincher" in persuading CEOs to move their offices to Georgia); Arthur M. Johnson, *The Challenge of Change: The Sun Oil Company 1925-1977* 242 n.* (1983) (Sun, with operations centered in Oklahoma, maintained Philadelphia headquarters so that executives could eat lunch at the Racquet Club); William H. Whyte, *CITY: Rediscovering the Center* 287-88 (1988) (of thirty-eight corporations that moved headquarters "during the height of the exodus" from New York, "thirty-one moved to a place close to the top man's home," dropping the average CEO commute to about eight miles).

benefits of the state's economy and laws will inure to the shareholders.[80]

(c) *The Master's View of "Fairness" Is Misguided.*— The Master's distaste for the Court's backup rule seems founded not on the assertion that the incorporating state's corporation law does not contribute to the "creation of benefits" (for surely it does), but rather on a notion that the wealth should be shared among the states in a kind of "from each according to his means, to each according to his needs" analysis. The supposed unfairness thus derives from Delaware's preeminence in attracting corporations.

The benefits Delaware provides to shareholders of its Delaware corporations are the direct result of great effort by its public servants. Delaware's corporation laws are "under constant scrutiny and review" in an annual amendatory process,[81] and the Chancery Court serves as a *de facto* national forum for corporation law issues, constituting "the nation's most experienced corporate law tri-

---

[80] When we move into the area of mutual funds, closed-end investment companies, CMO's and other pass-through issuers which are themselves conduits (*see supra* p. 51 n.64), the notion of a "principal executive office" having some substantive significance is even more attenuated. In practical terms, the decisions as to buying and selling portfolio securities in mutual funds and other investment companies are generally made by a single portfolio manager. *See* Burton G. Malkiel, *A Random Walk Down Wall Street* 376-84 (5th ed. 1990). The productive activities of the portfolio companies—and indeed, even *their* principal executive offices—are often located somewhere else from where the portfolio manager is. In the case of pass-through debt securities, the centralized functions are essentially clerical—keeping track of incoming payments and distributing them. Here again, the Report is adrift about securities representing enormous portions of the present-day securities market. *See supra* pp. 13-14 n.17.

[81] R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* at H-18 (2d ed. 1991); S. Samuel Arsht, *A History of Delaware Corporation Law*, 1 Del. J. Corp. L. 1, 17-21 (1976).

bunal."[82] The state devotes significant resources to provide these benefits. Over the past three years, roughly 65 percent of the trial days spent by the Delaware Court of Chancery were devoted to trials involving corporations incorporated in Delaware. Approximately 57 percent of the opinions written by the Court during the same period resolved issues arising under the Delaware General Corporation Law.[83] And Delaware now spends more than $4 million per year maintaining its Division of Corporations. Delaware works hard to provide a valuable service to its corporations, which to a large extent are the nation's corporations. There is nothing "unfair" about Delaware's requiring them to turn over the unclaimed property of unknowns which they hold.

At bottom, the Report's recommendation is not at all based on the "lawyerlike definition of state power over this subject" that Justice Jackson called for in *Connecticut Mutual Life* and that the Court provided "once and for all" in *Texas* v. *New Jersey*. It is, instead, based on a leveling view of "fairness." Whether that is a wise policy is not for this Court to decide. Indeed, revision now as a result of the Master's variation from the *Texas* rule will lead only to further cases brought in an effort to revise the rule in other ways perceived by other states to be more fair to them. The remedy, if one is needed, lies with Congress.

---

[82] Ronald Gilson, An evaluation of Pennsylvania Senate Bill 1310 at 7 (issued to the Pennsylvania General Assembly in connection with the Pennsylvania Takeover Act of 1990) (on file with counsel of record). *Accord* Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 Nw. U. L. Rev. 542, 589 (1990); Jonathan R. Macey & Geoffrey P. Miller, *Toward an Interest-Group Theory of Delaware Corporate Law*, 65 Tex. L. Rev. at 488.

[83] Statement of Richard Kiger, App. E hereto at p. 91a. The opinions in these cases tend to be more elaborate and thus more demanding of the Court's time than non-corporation law opinions. *Id.* ¶ 5.

C. The Master's Recommendations, Both as to the "State of Incorporation" and the "Debtor as Issuer" Points, Violate This Court's Teachings on the Principles of *Stare Decisis*

The Master's recommendations on the two points just discussed include one acknowledged departure from the rule of *Texas* v. *New Jersey*, the rejection of the "state of incorporation" rule, and one unacknowledged departure, the "issuer as debtor" recommendation. There is no occasion presented in this case, however, for this Court to depart from the doctrine of *stare decisis*.

In making its recommendations, the Report does not even acknowledge the "central importance of *stare decisis* in this Court's jurisprudence." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563 (1991). "Time and time again, this Court has recognized that 'the doctrine of *stare decisis* is of fundamental importance to the rule of law.'" *Id.* (quoting *Welch* v. *Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 494 (1987)); *see also Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989); *Burnet* v. *Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting).

While departure from the doctrine of *stare decisis* always requires "some compelling justification," *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. at 564, several factors—none of which are acknowledged in the Report—give *stare decisis* special force in this case. First, this Court has already rejected an attempt to "modify" the *Texas* rule based on the same factors that motivated the Master's recommendation here, when it declined to carve out an exception to the backup rule for situations that "involve a higher percentage of unknown addresses." *Pennsylvania* v. *New York*, 407 U.S. at 214. As the Court has explained, "[a] litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence." *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980).

Substituting references, the *Walker* Court's rejection of such a request applies with equal force here: "the reasons [Intervenors] assert[] for overruling [*Texas*] are the same factors which we concluded in [*Pennsylvania* v. *New York*] did not undermine the validity of [*Texas*]." *Walker*, 446 U.S. at 749; *accord Flood* v. *Kuhn*, 407 U.S. 258, 282 (1972) (declining to overturn "aberration" of antitrust exemption for major league baseball granted in *Federal Base Ball Club* v. *National League*, 259 U.S. 200 (1922), and adhered to in *Toolson* v. *New York Yankees, Inc.*, 346 U.S. 356 (1953)).

Second, "Congress remains free to alter what [the Court has] done." *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. at 564 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. at 172-73).[84] Although this principle is generally applied in matters of statutory construction, it surely applies here, where the Court's rules operate only in the absence of an "applicable federal statute." *Texas* v. *New Jersey*, 379 U.S. at 677.

The *Texas* rule has been the subject of "something other than mere congressional silence and passivity." *Flood* v. *Kuhn*, 407 U.S. at 283. Congress has modified the *Texas* rule in one limited respect and, in doing so, has acknowledged its general applicability. (This 1974 revision is discussed above at p. 8 & n.5.) Aside from the 1974 statute, Congress has not modified the *Texas* rule and no efforts have been made to do so, notwithstanding Congress' frequent attention to the area of escheat of unclaimed property, which has resulted in myriad instances of congressional displacement of the states' traditional authority where federal interests demanded it.[85] Congress has, of course, acknowledged the

---

[84] *Accord, e.g., Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977); *Edelman* v. *Jordan*, 415 U.S. 651, 671 n.14 (1974).

[85] *E.g.*, Pub. L. No. 101-510, Div. A, Title XV, § 1520(e), 104 Stat. 1485, 1732 (1990) (codified at 24 U.S.C. § 420(e)) (property

authority of the states to escheat under the state statutes passed in the wake of *Texas* v. *New Jersey* (*e.g.*, Pub. L. No. 97-320, Title IV, Pt. A. § 412, 96 Stat. 1469, 1521

---

of intestate residents of Armed Forces Retirement Home); Pub. L. No. 100-203, Title X, § 10621(a), 101 Stat. 1330, 1330-452 (1987) (codified at 26 U.S.C. § 6408) (unclaimed federal income tax refunds); Pub. L. No. 98-359, § 2, 98 Stat. 402 (1984) (codified at 31 U.S.C. § 1322) (unclaimed property held by the old postal saving system); Pub. L. No. 98-25, §§ 2, 3, 97 Stat. 185 (1983) (codified at 25 U.S.C. § 373b) (estates of Indians dying intestate without heirs); Pub. L. No. 97-459, Title II, § 206, 96 Stat. 2515, 2518-19 (1983) (codified at 25 U.S.C. §§ 2205, 2206) (enabling Indian tribes to escheat members' property); Pub. L. No. 97-320, Title IV, § 408, 96 Stat. 1469, 1513-15 (1982) (codified at 12 U.S.C. §§ 216 to 216d) (unclaimed property of closed national banks); Pub. L. No. 97-306, Title IV, § 401(a), 96 Stat. 1429, 1442 (1982) (codified at 38 U.S.C. § 1970(h)) (veterans' benefits); Pub. L. No. 93-445, Title I, § 6, 88 Stat. 1305, 1334-38 (1974) (codified at 45 U.S.C. § 231e(a)(5)) (railroad employees' benefits); Pub. L. No. 92-203, § 7, 85 Stat. 688, 691-94 (1974) (codified at 43 U.S.C. § 1606(h)(2)(A)) (stock in Alaska Native Regional Corporations); Pub. L. No. 92-117, 85 Stat. 337 (1971) (formerly codified at 31 U.S.C. § 1322) (unclaimed property held by the old postal saving system); Pub. L. No. 91-240, 84 Stat. 203 (1970) (codified at 25 U.S.C. § 375d) (property of intestate members of certain Indian nations); Pub. L. No. 90-114, § 3, 81 Stat. 335 (1967) (codified at 25 U.S.C. § 1153) (same); Pub. L. No. 90-76, § 3, 81 Stat. 177 (1967) (codified at 25 U.S.C. § 788) (same); Pub. L. No. 89-700, Title II, § 202(b), 80 Stat. 1079, 1087 (1966) (codified at 45 U.S.C. § 352(g)) (railroad employees' benefits); Pub. L. No. 89-717, § 2, 80 Stat. 1114, 1115 (1966) (codified at 25 U.S.C. § 967b) (property of intestate members of certain Indian nations); Pub. L. No. 89-660, § 3, 80 Stat. 910 (1966) (codified at 25 U.S.C. § 1133) (same); Pub. L. No. 89-656, § 3, 80 Stat. 906 (1966) (codified at 25 U.S.C. § 1103) (same); Pub. L. No. 89-554, 80 Stat. 378, 595 (1966) (codified at 5 U.S.C. § 8705(d)) (government employees' life insurance); *see also* Pub. L. No. 85-857, §§ 717, 750, 3202(e), 5294-5295, 72 Stat. 1105, 1152, 1160, 1232, 1258 (1958) (codified at 38 U.S.C. §§ 1917(d)), 1950, 5502(e), 8504-8505) (veterans' benefits and unclaimed property on Veterans Administration premises); Pub. L. No. 84-1028, c. 1041, §§ 2571-2575, 70A Stat. 1, 143-44 (1956) (codified as amended at 10 U.S.C. §§ 2571-2577) (property in custody of United States Military); Pub. L. No. 77-774, c. 640, 56 Stat. 1021, 1021-22 (1942) (codified at 25 U.S.C. § 373a) (estates of Indians dying intestate without heirs).

(1982) (codified at 12 U.S.C. § 484(b)) (allowing state examination of national banks for purpose of assuring compliance with state escheat laws)).

In light of this activity, which has not given rise to any statutory disapproval of the general *Texas* rule, Congress—not the Court—is the appropriate body to revise the *Texas* rule, if revision be needed. *See Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. at 564 ("Congress has had almost 30 years in which it could have corrected our decision . . . if it disagreed with it, and has not chosen to do so. We should accord weight to this continued acceptance of our earlier holding."); *Flood* v. *Kuhn*, 407 U.S. at 283-84 ("we continue to be loath . . . to overturn those cases judicially when Congress, by its positive inaction, has allowed those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively"); *Toolson* v. *New York Yankees, Inc.*, 346 U.S. at 357 (declining to depart from precedent where "Congress has had the ruling under consideration but has not seen fit" to overturn it for 30 years).[86]

Third, the Report's recommendation would disturb settled expectations that have now grown into a multistate cooperative effort and are reflected on the states' statute books. Every state unclaimed property statute that treats the issue defines the debtor's domicile as its state of incorporation, and every such state has acted in reliance on the

---

[86] Congress' general acceptance of the *Texas* rule makes the Intervenors' reliance on *Morgane* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), and *United States* v. *Hutcheson*, 312 U.S. 219 (1941), inapposite. In those cases, the Court developed an evolving body of common law in light of sweeping policy changes wrought, in part, by a "series of enactments" (*Hutcheson*, 312 U.S. at 235 (antitrust and labor relations); *Morgane*, 398 U.S. at 388-90 (admiralty)) that bore on the common law's development. This case, in contrast, concerns a simple, comprehensive rule that has sufficed for close to thirty years, with no doctrinal development needed and no congressional disapproval expressed.

Texas rule in this regard. Those statutes refer, also, to *holders*. *See supra* pp. 10, 32. These considerations weigh heavily against the Report's recommendations and were not discussed by the Master. As the Court explained in *Hilton* v. *South Carolina Pub. Rys. Comm'n*, "*stare decisis* has added force when the legislature, in the public sphere, and citizens, in the private realm, have acted in reliance on a previous decision, for in this instance overruling the decision would dislodge settled rights and expectations or require an extensive legislative response." 112 S. Ct. at 564; *accord United States* v. *Maine*, 420 U.S. 515, 527 (1975) ("in the almost 30 years since *California*, a great deal of public and private business has been transacted in accordance with those decisions and in accordance with major legislation enacted by Congress, a principal purpose of which was to resolve the 'interminable litigation' arising over [this] controversy").

The recommended changes would force almost every state to amend its statutes and would require an evaluation of every issuer's principal executive office, going back as far as records permit. The burden of this change would fall hard on Delaware, which has for nearly thirty years relied on the *Texas* rule for a substantial portion of its revenue, and might now face the prospect of the other states looking to it (and thus to its taxpayers) for "recovery" of hundreds upon hundreds of millions of dollars: "if the doctrine of *stare decisis* has any meaning at all, it requires that people in their everyday affairs be able to rely on [this Court's] decisions and not be needlessly penalized for such reliance." *United States* v. *Mason*, 412 U.S. 391, 399-400 (1973) (citing *Flood* v. *Kuhn*, 407 U.S. at 283, and *Wallace* v. *McConnell*, 38 U.S. (13 Pet.) 136, 150 (1839)). The Report does nothing if it does not penalize the taxpayers of Delaware—a penalty supported by no "compelling justification."

These factors give *stare decisis* added force and make the Intervenors' burden a particularly heavy one. They

do not meet it. In *Patterson* v. *McLean Credit Union*, 491 U.S. 164 (1989), the Court laid out the traditional justifications for overruling a prior case. It first explained that the "primary reason" for a departure from *stare decisis* "has been the intervening development of the law, through either the growth of judicial doctrine or further action taken by Congress, [w]here such changes have removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies." 491 U.S. at 173 (citations omitted). Here, intervening legal developments support continued adherence to the corporate domicile rule, and do not suggest that a "debtor" is other than a "debtor." *See supra* pp. 53-55.

A second traditional justification exists where the precedent is a "positive detriment to coherence and consistency in the law, either because of inherent confusion created by an unworkable decision, or because the decision poses a direct obstacle to the realization of important objectives embodied in other laws." *Patterson* v. *McLean Credit Union*, 491 U.S. at 173 (citations omitted). No party makes any assertion that the corporate domicile rule is "unworkable" or poses any obstacle to any objectives embodied in other laws; indeed, no one can point to a more "workable" rule than the state of incorporation rule; and retention of the *Texas* rule *furthers* the federal policies that gave rise to it (*see supra* pp. 3-7, 55). The same can be said of the "issuer as debtor" point. *See supra* pp. 45-49.

Finally, the *Patterson* Court observed that sometimes "a precedent becomes more vulnerable as it becomes outdated and after being ' "tested by experience, has been found to be inconsistent with the sense of justice or with social welfare." ' "[87] The Court had reservations about

---

[87] 491 U.S. at 174 (quoting *Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring), quoting, in turn, Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

the availability of this ground in cases where Congress might act. 491 U.S. at 174-75. Yet this ground—rightly or wrongly invoked—appears to be the sole basis for the Master's recommendation that the *Texas* rule be overturned. Of course, the Court's reluctance to change a rule within the control of Congress on grounds of "justice" and "social welfare" is fully warranted. *See supra* pp. 71-73. And, as we showed in Parts A and B, the Master has made out no case under this heading, if it is to be considered at all. *See supra* pp. 49-52, 61-69.

Adjustments in this area are matters for Congress. The Court has laid down, and reaffirmed, the fundamental principles. The present case involves an application of them to a particular industry and to particular conditions in that industry. If the Court modifies the principles to deal with this case, it will be called upon to do so in other cases. There is no demonstration that the application of the rules in this case produces a shocking or unexpected result, particularly given the fact that any rule that might be established on this subject admittedly has arbitrary elements. *See Texas* v. *New Jersey*, 379 U.S. at 683. The rules and their application here are well-grounded in the historical jurisprudence of this Court. If an alteration in those rules is to be made because of a contention that it would be more "fair," in some sense, to have another rule for the situation involved in this case, Congress, which provided such a forum after this Court's decision in the *Pennsylvania* case, is available.

II. IF CHANGES TO THE *TEXAS* RULE ARE TO BE MADE, THEY SHOULD NOT BE APPLIED RETROACTIVELY AGAINST DELAWARE

The Master dealt with what he called issues of "reach-back" and "retroactivity." Report 70-77. Discussing both the "issuer as debtor" and "corporate domicile" points, he recommended full retroactive application as to both. Report 72. "Retroactivity" meant not simply that the rule that would govern property that had theretofore become escheatable but had not been taken by one of the

states; it also extended to sums already collected by the states, and this went back without limitation as to time. Although Delaware is a plaintiff here, not a defendant, the Report's recommendations seem aimed at Delaware, as well as New York; the Draft Report had contained a recommendation that Delaware's reliance on the existing rule of corporate domicile be acknowledged,[88] but this was eliminated from the final Report. If the rules are to be changed at all—and they should not be—Delaware should not be subjected to retroactive application of the new rules.

That the Master wrestled at all with the issue of "retroactivity" demonstrates the departure he would have the Court make from the *Texas* rule. "In the ordinary case no question of retroactivity arises. Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to the bar." *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2442 (1991) (plurality opinion). It is only "[i]n those relatively rare circumstances where established precedent is overruled [that] the doctrine of nonretroactivity" is even considered, "in order to avoid 'jolting the expectations of parties to a transaction.'" *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 196 (1990) (plurality opinion) (quoting *United States* v. *Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring)); *accord American Trucking*, 496 U.S. at 222 (dissenting opinion) ("'[t]he usual rule is that federal cases should be decided in accordance with the law existing at the time of decision'") (quoting *Saint Francis College* v. *Al-Khazraji*, 481 U.S. 604, 608 (1987)).

Of course, the most obvious and appropriate way to avoid jolting the expectations of the parties in this case is to adhere to the *Texas* rule: "[c]onsiderations of finality and the justifiable expectations that have grown up surrounding a rule are ordinarily and properly given

---

[88] Draft Report 57 n.64, quoted in our Exceptions, *supra* at E-8.

expression in our rules of res judicata and *stare decisis*." *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 212 (dissenting opinion); *see James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2450 (Blackmun, J., concurring in the judgment) ("retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself"). These reasons fully explain why the Court in *Pennsylvania* v. *New York* applied the *Texas* rule to all the property at issue in the case, rejecting New York's assertion that the *Texas* rule was "not retroactive." 407 U.S. at 212-13. Prior to the *Texas* case, there was *no* rule governing conflicting state claims to escheat, and hence no expectations about the subject. The Court thus strictly applied the *Texas* rule.[89] Strict application of the *Texas* rule, until it is changed, is fully consistent with the parties' expectations, as is evident from the widespread adoption of the uniform acts providing that the "holder" of unclaimed, "owner/address unknown" property is to deliver that property to the holder's state of incorporation. *See supra* pp. 10-11, 32. Thus, all the parties except one part of the Texas group agreed with the Master's initial Draft Report that a state's prior reliance on the traditional corporate domicile rule should preclude any retroactive application of the

---

[89] One subgroup of the Intervenors suggested that this routine application of law to fact somehow establishes that "nonretroactivity is unsuited to this very unique area of the law . . . due to the very considerations of fairness that propelled the Court's ruling" in *Texas*. Tx. Supp. Br. (Nov. 4, 1991) at 12. That is absurd. The Court in *Pennsylvania* did not evaluate "retroactivity" issues because it was simply adhering to the only precedent that existed; it had no occasion to consider whether this area of the law is so "unique" that ordinary legal doctrines once established should be retroactively displaced in favor of the shifting sands of what appeals as "fair" in a particular case. In addition, the Intervenors' suggestion (*id.* at 11-12) that all states acquire unclaimed property under custodial taking statutes as "conservators" is flat wrong. Several states have true escheat statutes, cutting off the claims of all others. *See supra* p. 2 n.1.

Master's recommendation to depart from that rule.[90] *See* our Exceptions, *supra* at E-8 (quoting Draft Report 57 n.64).

Should the Court depart from the *Texas* rule by adopting either of the changes, acknowledged or unacknowledged, recommended by the Master, the circumstances of the case call for nonretroactivity for Delaware and any state similarly situated. The proper scope of the Court's leading decision on the subject, *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 105-10 (1971), has generated substantial recent debate. But whether *Chevron* is properly viewed as authorizing the prospective application of a new *rule of law* to litigants before the Court,[91] or only as announcing an equitable discretion as to the *relief* that a federal court should award when applying the new law,[92] it should be applied here to protect Delaware from a departure from the *Texas* rule, if a departure is made.

Under *Chevron*, a three-factor analysis is made:

> First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression

---

[90] Ala. Supp. Br. (Nov. 4, 1991) at 29 n.19; Cal. Supp. Reply Br. (Nov. 21, 1991) at 18-19. The Texas group made the frivolous assertion that the change is "merely a refinement rather than a reversal." Tex. Supp. Br. (Nov. 4, 1991) at 14. No support is given for this view, and we are hard pressed to imagine what could possibly constitute a new rule if not one that would render invalid every state statute concerning the backup rule written after the *Texas* decision.

[91] *See James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2448-49 (White, J., concurring in the judgment); *id.* at 2453-56 (O'Connor, J., dissenting).

[92] *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2448 (opinion of Souter, J.); *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 222-24 (Stevens, J., dissenting).

> whose resolution was not clearly foreshadowed. Second, . . . we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally, we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Chevron Oil Co. v. *Huson*, 404 U.S. at 106-07 (citations and internal quotations omitted).

First, both recommendations are to overrule clear precedent. As we have demonstrated above, the alleged "ambiguity" leading to the "issuer as debtor" recommendation is one created by the Report, not the *Texas* rule. The plain meaning of the word "debtor" was applied by the drafters of two uniform acts and the legislatures of the states that have adopted those statutes to mean "holder," and that application comports with this Court's longstanding precedents. *See supra* pp. 2-6, 32-34. And it is difficult to imagine a clearer precedent than the backup rule's provision that "the State of the debtor's incorporation may take custody of the funds." *Pennsylvania* v. *New York*, 407 U.S. at 210-11. That rule (and the uniform acts incorporating it) would no longer be the law if the Master's recommendation is accepted.

Second, the "purpose and effect" of the *Texas* rule was to provide certainty to states and private persons faced with conflicting escheat claims. *See supra* pp. 2-6, 45-46. Indeed, from the time the Court first confronted the need for a rule of priority among states in *Connecticut Mutual Life* to the time it fashioned a rule "once and for all" in *Texas* v. *New Jersey* (and adhered to it in *Pennsylvania* v. *New York*), if one thing was recognized, it was the need for a clear, certain and simple rule. Surely that purpose would not be served by providing incentives to the states to urge revisions to that rule in litigation

before this Court, by permitting them to make retroactive claims on property which had already been escheated to another state, no matter how many years before.[93]

Third, retroactive application of the Master's proposed change of the backup rule against Delaware and states similarly situated would be harshly inequitable. The Court is sensitive in this context to the special needs of state governments: "state officials and those with whom they deal are entitled to rely on a presumptively valid state statute, enacted in good faith and by no means plainly unlawful." *Lemon* v. *Kurtzman*, 411 U.S. 192, 209 (1973) (plurality opinion). "To the extent that retrospective application of a decision burdens a government's ability to plan or carry out its programs, the application injures all of the government's constituents. These concerns have long informed the Court's retroactivity decisions." *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 185 (plurality opinion); *see James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2448 (opinion of Souter, J.) ("[n]othing we say here deprives respondent of [its] opportunity to . . . demonstrate reliance interests entitled to consideration in determining the nature of the remedy that must be provided"); *cf. Cipriano* v. *City of Houma*, 395 U.S. 701, 706 (1969) ("Significant hardships would be imposed on cities, bondholders, and others connected with municipal utilities if our decision today were given full retroactive effect.").

Delaware and the other states have promulgated and implemented their escheat statutes in reliance on this

---

[93] In no way can the Court's caveat in *Pennsylvania* v. *New York* that a state may escheat unclaimed property "'until some other State comes forward with proof that it has a superior right to escheat'" 407 U.S. at 210-11 (quoting *Texas* v. *New Jersey*, 379 U.S. at 682), be read to contemplate that such "proof" would be found in an overruling of the *Texas* rule itself. The Decree in *Pennsylvania* makes clear that the "proof" required had to do with moving property out of the category of the "backup rule" into the category of the "primary rule"—by reason of either the identification of a last-known address or the intervening passage of an escheat statute by the state of last-known address. *See supra* p. 7 n.4.

Court's precedents in *Texas* and *Pennsylvania*. Because they could not "be expected to foresee that a decision of this Court would overturn established precedents, the inequity of unsettling actions taken in reliance on those precedents is apparent." *American Trucking Ass'ns* v. *Smith*, 496 U.S. at 182. As in *American Trucking*, "the invalidation" of Delaware's escheat law "would have potentially disruptive consequences for the State and its citizens." *Id.*; *see supra* pp. 73-74. In contrast, the Intervenors seek retroactivity in order to collect a windfall from Delaware—a windfall they had no reason to expect and no justification for receiving.

The Report does not deny that Delaware has relied on the *Texas* rule, nor the substantial hardship that would befall Delaware if the rule of corporate domicile were overturned. Instead, it focuses on the rule that laches and statutes of limitation do not apply to actions by states, apparently in the belief that the rule has something to do with remedies and therefore should bar any assertion of nonretroactivity here. Report 75 (citing *Illinois* v. *Kentucky*, 111 S. Ct. 1877, 1883 (1991)). But retroactivity of doctrinal change is one thing, and laches and limitations are another. In any event, the doctrine of no limitations against the sovereign is based on "[t]he public interest in preserving public rights and property from injury and loss, [which] justifie[s] a special rule for the sovereign." *Block* v. *North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting). The doctrine is thus questionable in actions *between* states.[94] We fail to understand what "public rights and property" would be preserved by transferring money properly collected by Delaware under the backup rule to other states which, until they intervened in this case and jumped on the band-

---

[94] In actions concerning boundary disputes, for example, the policy is of lesser force, and "the broad policy disfavoring the untimely assertion of rights that underlies the defense of laches and statutes of limitation" is achieved through the application of other doctrines. *Illinois* v. *Kentucky*, 111 S. Ct. at 1883.

wagon of the Master's *sua sponte* rule change, had not even the slightest expectation of ever receiving it.[35]

III. JUDGMENT SHOULD BE ENTERED IN FAVOR OF DELAWARE AND AGAINST NEW YORK

The Report resoundingly rejects New York's theories (purporting to be factual assertions) about the moneys at issue in this case. New York argues that unclaimed property involved in this case determined by the brokers to be "owner/address unknown" should nonetheless be "deemed" to be owed to other brokers, all of whom should be deemed to have "trading addresses" in New York, and therefore that New York is entitled to "a presumption of location based on aggregate statistics." Report 58-59 & n.50; *see supra* p. 19. In short, says New York, these items of cash dividends and interest and share dividends in the brokers' hands are really "owner/address known" and should pass to New York under the primary rule. The Report rejects this position as "inconsistent with *Pennsylvania* v. *New York*, where the Court refused to allow an equally-apt presumption—that the state in which the money orders were purchased was the state of the sender's domicile—to govern. To the extent this is New York's position, judgment against it is entirely appropriate." Report 59 n.50.

Similarly, the Master rejects the entire notion of "trading addresses," noting that "this is not a concept

---

[35] Of course, none of this is to say that the *current* rules should not apply to property that New York has wrongfully taken custody of—that is nothing more than the routine application of settled law to the facts of the case. Perhaps the greatest irony of all in the Report is that its recommendations might well result in New York *keeping* what it has taken, in contravention of both the old and the new rules. As a sort of tertiary backup rule, the Report recommends that the state of principal executive office of the *holder* take priority where there is no record that identifies the *issuer*. Report 57, A-3 ¶ 4. The Master did not permit discovery into whether New York has retained records revealing issuer identities, but New York has had no reason to do so under the current rules; to the extent it has not, New York—as the state of principal executive office of many of the brokers and the DTC—will retain the funds at issue in the case.

used in securities law, the Uniform Commercial Code, debtor-creditor law, or the law of personal jurisdiction, venue, or subject matter jurisdiction of the courts. From all that I have been shown, this 'trading address' approach seems to be a conception created out of whole cloth by New York, to favor itself in the instant case—or, perhaps more accurately, to rationalize post-hoc what it has been doing for years." Report 67 n.59.

It was undisputed on the record that brokers and banks cannot identify the creditor who is owed the unclaimed distributions involved in this case. Cirrito Dep. 73 ("any kind of research would really be fruitless"), 128 ("you don't know to whom the monies are due. If you did, you would pay them"), 93-94, 222-23; Shearer Dep. 103, 108-09, 192-93, 198, 213-15, 348-49; Scott Dep. 207-08; Principe Dep. 102-05, 222.

New York's "factual" argument to the contrary does not withstand scrutiny. It asserts that *most* unclaimed distributions are caused by a phenomenon known as "nominee float," where a certificate registered in the name of a broker is endorsed and delivered to a customer in bearer form, is traded from hand to hand in the stream of commerce, and is not submitted to the transfer agent for re-registration for some time. In the meantime, dividends are paid to the broker as the recordholder. *See* N.Y. Motion for Judgment (Oct. 30, 1990) at 56-57 & n.101; Report B-16 to B-17, ¶ 57. New York ignores errors, missed transfers, and out-of-balance record conditions, which are also causes of "owner/address unknown" distributions.[96] But even leaving aside those other causes for "owner/address unknown" distributions, New York's analysis of "nominee float" is unavailing. New York states only that the *first* bearer holder of the certificate could be identified. Griffin Aff. ¶ 2. But it concedes that

---

[96] *See* Report B-10 to B-15, ¶¶ 36-51 (describing "Cede float" and other causes of unclaimed distributions), B-16 to B-19, ¶¶ 57-67 (same, for brokers), B-20 to B-22, ¶¶ 73-77 (same, for banks); Cirrito Dep. 223-27; Shearer Dep. 193-96; Principe Dep. 102-03; Scott Dep. 163-67.

the owner of the certificate on the dividend record date or dates cannot be ascertained, N.Y. Motion for Judgment (Oct. 30, 1990) at 30, 56, and that *that* person's identity is the relevant inquiry. *Id.* at 56-57. Moreover, New York argues that the very same "float" problems when encountered at DTC ("Cede float") and at New York banks result in "true" "owner/address *unknown*" funds that may be rightfully claimed by New York *under the backup rule*, since DTC and the banks are New York corporations (N.Y. Motion for Judgment (Oct. 30, 1990) at 30). New York offers no reason why brokers are any different.

The Master's finding of fact on this issue was clearly correct. The funds are "owner/address unknown." Although the Report proceeds to devote considerable attention to demonstrating why New York's "factual contentions are actually beside the point" under the Master's proposed new rules, the Report nonetheless clearly, and correctly, rejects New York's position on the facts.[97]

However, the Report fails to make an alternative recommendation that judgment be entered against New York on the basis of those findings in the event that the Court retains the *Texas* rule as Delaware interprets it. Since Delaware brought this lawsuit to recover the "owner/address unknown" funds that New York has improperly escheated from Delaware brokers under the *Texas* rule, this oversight is more than a semantic one. Delaware is, at this juncture, entitled to judgment against New York, because the Master has correctly concluded that there is no genuine issue of material fact presented by New York's theory. *Cf.* Fed. R. Civ. P. 56(e) (New York has not

---

[97] At one point, the Report states that—under its proposed rules—New York should have an opportunity to pursue its factual contentions if it is so advised. Report 67. But the Report is discussing efforts to trace payments "on a transaction-by-transaction basis" to beneficial owners (*not* brokers) who might have last-known addresses in New York, rather than expressing any doubt about the Report's findings of the unacceptability of New York's contentions about "trading addresses" and "statistical showing[s]." *Id.* at 58-59 & n.50; 67 n.59.

"set forth specific facts showing that there is a genuine issue for trial").

CONCLUSION

For the reasons stated, Delaware's Exceptions to the Report of the Special Master should be sustained. The Court should reject the Master's recommendation that the "issuer" should be viewed as the "debtor" even though it has properly paid the dividends and interest to the recordholders, and should reject the Master's recommendation for a change in the definition of corporate domicile. There should accordingly be judgment against the Intervenors. The Court should reject New York's contentions that the property in the brokers' hands owed to unknowns should be "statistically" deemed to be owed generically to "other brokers," and that those brokers should be deemed to have "trading addresses" in New York, and should render judgment in favor of Delaware against New York.

A proposed form of Decree is respectfully attached as Appendix F hereto.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Plaintiff,
State of Delaware

May 1992

TABLE OF CONTENTS

Page

APPENDIX A—Constitutional, Statutory and Regulatory Provisions

I. United States Constitution

Article I, Section 8 ..... 1a

Article IV, Section 1 ..... 1a

Amendment XIV, Section 5 ..... 1a

II. Acts of Congress

The "Western Union" Statute—12 U.S.C. §§ 2501 to 2503 ..... 1a

III. Uniform Acts—Selected Provisions

A. 1981 Uniform Unclaimed Property Act 4a

B. 1966 Revision of Uniform Disposition of Unclaimed Property Act 17a

C. Uniform Commercial Code

U.C.C. § 8-207 ..... 23a

U.C.C. § 9-103 ..... 24a

D. Model Business Corporation Act

Section 1.40(21) 27a

Section 7.07 ..... 27a

Section 7.23 ..... 28a

IV. New York Abandoned Property Law

Article V 29a

Article V-A 37a

V. SEC Rules

A. Rules under Section 14, Securities Exchange Act of 1934:

14a-7 ..... 53a

14a-13 ..... 55a

TABLE OF CONTENTS—Continued

Page

14b-1 ..... 60a

14b-2 ..... 64a

14c-7 ..... 70a

B. Rules under Section 15(c), Securities Exchange Act of 1934:

15c3-2 ..... 75a

15c3-3(e) 76a

15c3-3 — Exhibit A 78a

APPENDIX B

Exhibit 1 to Special Consultant's Agreement (Unclaimed Property Clearinghouse) 80a

APPENDIX C

Letter from Paula Smith, Director, Unclaimed Property Division, Texas Treasury Department, to Peggy Maggiacomo, E.F. Hutton & Co. (Oct. 16, 1986) 82a

APPENDIX D

State Corporation Laws Treating Recordholder As Exclusive Shareholder 86a

APPENDIX E

Statement of Richard Kiger, Master in Chancery, State of Delaware 90a

APPENDIX F

Proposed Decree 93a

APPENDIX A

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

I. UNITED STATES CONSTITUTION

ARTICLE 1, Section 8:

The Congress shall have Power . . .

To regulate Commerce with foreign Nations, and among the several States . . . .

* * * *

ARTICLE IV, Section 1:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be provided, and the Effect thereof.

* * * *

AMENDMENT XIV, Section 5:

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

II. ACTS OF CONGRESS

The "Western Union" statute:

12 U.S.C. § 2501. Congressional findings and declaration of purpose

The Congress finds and declares that—

(1) the books and records of banking and financial organizations and business associations engaged in issuing and selling money orders and traveler's checks do not, as a matter of business practice, show the last known addresses of purchasers of such instruments;

(2) a substantial majority of such purchasers reside in the States where such instruments are purchased;

(3) the States wherein the purchasers of money orders and traveler's checks reside should, as a matter of equity among the several States, be entitled to the proceeds of such instruments in the event of abandonment;

(4) it is a burden on interstate commerce that the proceeds of such instruments are not being distributed to the States entitled thereto; and

(5) the cost of maintaining and retrieving addresses of purchasers of money orders and traveler's checks is an additional burden on interstate commerce since it has been determined that most purchasers reside in the State of purchase of such instruments.

§ 2502. Definitions

As used in this chapter—

(1) "banking organization" means any bank, trust company, savings bank, safe deposit company, or a private banker engaged in business in the United States;

(2) "business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals; and

(3) "financial organization" means any savings and loan association, building and loan association, credit union, or investment company engaged in business in the United States.

§ 2503. State entitlement to escheat or custody

Where any sum is payable on a money order, traveler's check, or other similar written instrument (other than a third party bank check) on which a banking or financial organization or a business association is directly liable—

(1) if the books and records of such banking or financial organization or business association show

the State in which such money order, traveler's check, or similar written instrument was purchased, that State shall be entitled exclusively to escheat or take custody of the sum payable on such instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum;

(2) if the books and records of such banking or financial organization or business association do not show the State in which such money order, traveler's check, or similar written instrument was purchased, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, until another State shall demonstrate by written evidence that it is the State of purchase; or

(3) if the books and records of such banking or financial organizations or business association show the State in which such money order, traveler's check, or similar written instrument was purchased and the laws of the State of purchase do not provide for the escheat or custodial taking of the sum payable on such instrument, the State in which the banking or financial organization or business association has its principal place of business shall be entitled to escheat or take custody of the sum payable on such money order, traveler's check, or similar written instrument, to the extent of that State's power under its own laws to escheat or take custody of such sum, subject to the right of the State of purchase to recover such sum from the State of principal place of business if and when the law of the State of purchase makes provision for escheat or custodial taking of such sum.

III. UNIFORM ACTS—SELECTED PROVISIONS

A. UNIFORM UNCLAIMED PROPERTY ACT (1981 ACT)

§ 1. [Definitions and Use of Terms]

As used in this Act, unless the context otherwise requires:

(1) "Administrator" means [ ].

(2) "Apparent owner" means the person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.

(3) "Attorney general" means the chief legal officer of this State.

(4) "Banking organization" means a bank, trust company, savings bank, [industrial bank, land bank, safe deposit company,] private banker, or any organization defined by other law as a bank or banking organization.

(5) "Business association" means a non-public corporation, joint stock company, investment company, business trust, partnership, or association for business purposes of 2 or more individuals, whether or not for profit, including a banking organization, financial organization, insurance company, or utility.

(6) "Domicile" means the state of incorporation of a corporation and the state of the principal place of business of a unincorporated person.

(7) "Financial organization" means a savings and loan association, [cooperative bank,] building and loan association, or credit union.

(8) "Holder" means a person, wherever organized or domiciled, who is:

(i) in possession of property belonging to another,

(ii) a trustee, or

(iii) indebted to another on an obligation.

(9) "Insurance company" means an association, corporation, fraternal or mutual benefit organization, whether or not for profit, which is engaged in providing insurance coverage, including accident, burial, casualty, credit life, contract performance, dental, fidelity, fire, health, hospitalization, illness, life (including endowments and annuities), malpractice, marine, mortgage, surety, and wage protection insurance.

(10) "Intangible property" includes:

(i) monies, checks, drafts, deposits, interest, dividends, and income;

(ii) credit balances, customer overpayments, gift certificates, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;

(iii) stocks and other intangible ownership interests in business associations;

(iv) monies deposited to redeem stocks, bonds, coupons, and other securities, or to make distributions;

(v) amounts due and payable under the terms of insurance policies; and

(vi) amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance, or similar benefits.

(11) "Last known address" means a description of the location of the apparent owner sufficient for the purpose of the delivery of mail.

(12) "Owner" means a depositor in the case of a deposit, a beneficiary in case of a trust other than a deposit in trust, a creditor, claimant, or payee in the case of

other intangible property, or a person having a legal or equitable interest in property subject to this Act or his legal representative.

(13) "Person" means an individual, business association, state or other government, governmental subdivision or agency, public corporation, public authority, estate, trust, 2 or more persons having a joint or common interest, or any other legal or commercial entity.

(14) "State" means any state, district, commonwealth, territory, insular possession, or any other area subject to the legislative authority of the United States.

(15) "Utility" means a person who owns or operates for public use any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

§ 2. [Property Presumed Abandoned; General Rule]

(a) Except as otherwise provided by this Act, all intangible property, including any income or increment derived therefrom, less any lawful charges, that is held, issued, or owing in the ordinary course of a holder's business and has remained unclaimed by the owner for more than 5 years after it became payable or distributable is presumed abandoned.

(b) Property is payable or distributable for the purpose of this Act notwithstanding the owner's failure to make demand or to present any instrument or document required to receive payment.

§ 3. [General Rules for Taking Custody of Intangible Unclaimed Property]

Unless otherwise provided in this Act or by other statute of this State, intangible property is subject to the custody of this State as unclaimed property if the conditions rais-

ing a presumption of abandonment under Sections 2 and 5 through 16 are satisfied and:

(1) the last known address, as shown on the records of the holder, of the apparent owner is in this State;

(2) the records of the holder do not reflect the identity of the person entitled to the property and it is established that the last known address of the person entitled to the property is in this State;

(3) the records of the holder do not reflect the last known address of the apparent owner, and it is established that:

(i) the last known address of the person entitled to the property is in this State, or

(ii) the holder is a domiciliary or a government or governmental subdivision or agency of this State and has not previously paid or delivered the property to the state of the last known address of the apparent owner or other person entitled to the property;

(4) the last known address, as shown on the records of the holder, of the apparent owner is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property and the holder is a domiciliary or a government or governmental subdivision or agency of this State;

(5) the last known address, as shown on the records of the holder, of the apparent owner is in a foreign nation and the holder is a domiciliary or a government or governmental subdivision or agency of this State; or

(6) the transaction out of which the property arose occurred in this State, and

(i) (A) the last known address of the apparent owner or other person entitled to the property is unknown, or

(B) the last known address of the apparent owner or other person entitled to the property is in a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property, and

(ii) the holder is a domiciliary of a state that does not provide by law for the escheat or custodial taking of the property or its escheat or unclaimed property law is not applicable to the property.

* * * *

§ 11. [Property of Business Associations Held in Course of Dissolution]

Intangible property distributable in the course of a dissolution of a business association which remains unclaimed by the owner for more than one year after the date specified for final distribution is presumed abandoned.

§ 12. [Property Held By Agents and Fiduciaries]

(a) Intangible property and any income or increment derived therefrom held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner, within 5 years after it has become payable or distributable, has increased or decreased the principal, accepted payment of principal or income, communicated concerning the property, or otherwise indicated an interest as evidenced by a memorandum or other record on file prepared by the fiduciary.

(b) Funds in an individual retirement account or a retirement plan for self-employed individuals or similar account or plan established pursuant to the Internal Revenue laws of the United States are not payable or distributable within the meaning of subsection (a) unless, under

the terms of the account or plan, distribution of all or part of the funds would then be mandatory.

(c) For the purpose of this section, a person who holds property as an agent for a business association is deemed to hold the property in a fiduciary capacity for that business association alone, unless the agreement between him and the business association provides otherwise.

(d) For the purposes of this Act, a person who is deemed to hold property in a fiduciary capacity for a business association alone is the holder of the property only insofar as the interest of the business association in the property is concerned, and the business association is the holder of the property insofar as the interest of any other person in the property is concerned.

* * * *

§ 17. [Report of Abandoned Property]

(a) A person holding property tangible or intangible, presumed abandoned and subject to custody as unclaimed property under this Act shall report to the administrator concerning the property as provided in this section.

(b) The report must be verified and must include:

(1) except with respect to travelers checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of property of the value of $25 or more presumed abandoned under this Act;

(2) in the case of unclaimed funds of $25 or more held or owing under any life or endowment insurance policy or annuity contract, the full name and last known address of the insured or annuitant and of the beneficiary according to the records of the insurance company holding or owing the funds;

(3) in the case of the contents of a safe deposit box or other safekeeping repository or of other tan-

gible property, a description of the property and the place where it is held and may be inspected by the administrator and any amounts owing to the holder;

(4) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, but items of value under $25 each may be reported in the aggregate;

(5) the date the property became payable, demandable, or returnable, and the date of the last transaction with the apparent owner with respect to the property; and

(6) other information the administrator prescribes by rule as necessary for the administration of this Act.

(c) If the person holding property presumed abandoned and subject to custody as unclaimed property is a successor to other persons who previously held the property for the apparent owner or the holder has changed his name while holding the property, he shall file with his report all known names and addresses of each previous holder of the property.

(d) The report must be filed before November 1 of each year as of June 30, next preceding, but the report of any life insurance company must be filed before May 1 of each year as of December 31 next preceding. On written request by any person required to file a report, the administrator may postpone the reporting date.

(e) Not more than 120 days before filing the report required by this section, the holder in possession of property presumed abandoned and subject to custody as unclaimed property under this Act shall send written notice to the apparent owner at his last known address informing him that the holder is in possession of property subject to this Act if:

(i) the holder has in its records an address for the apparent owner which the holder's records do not disclose to be inaccurate,

(ii) the claim of the apparent owner is not barred by the statute of limitations, and

(iii) the property has a value of $50 or more.

* * * *

§ 19. [Payment or Delivery of Abandoned Property]

(a) Except as otherwise provided in subsections (b) and (c), a person who is required to file a report under Section 17, within 6 months after the final date for filing the report as required by Section 17, shall pay or deliver to the administrator all abandoned property required to be reported.

(b) If the owner establishes the right to receive the abandoned property to the satisfaction of the holder before the property has been delivered or it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property to the administrator, and the property will no longer be presumed abandoned. In that case, the holder shall file with the administrator a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

(c) Property reported under Section 17 for which the holder is not required to report the name of the apparent owner must be delivered to the administrator at the time of filing the report.

(d) The holder of an interest under Section 10 shall deliver a duplicate certificate or other evidence of ownership if the holder does not issue certificates of ownership to the administrator. Upon delivery of a duplicate certificate to the administrator, the holder and any transfer agent, registrar, or other person acting for or on behalf

of a holder in executing or delivering the duplicate certificate is relieved of all liability of every kind in accordance with the provision of Section 20 to every person, including any person acquiring the original certificate or the duplicate of the certificate issued to the administrator, for any losses or damages resulting to any person by the issuance and delivery to the administrator of the duplicate certificate.

§ 20. [Custody by State; Holder Relieved from Liability; Reimbursement of Holder Paying Claim; Reclaiming for Owner; Defense of Holder; Payment of Safe Deposit Box or Repository Charges]

(a) Upon the payment or delivery of property to the administrator, the state assumes custody and responsibility for the safe-keeping of the property. A person who pays or delivers property to the administrator in good faith is relieved of all liability to the extent of the value of the property paid or delivered for any claim then existing or which thereafter may arise or be made in respect to the property.

(b) A holder who has paid money to the administrator pursuant to this Act may make payment to any person appearing to the holder to be entitled to payment and, upon filing proof of payment and proof that the payee was entitled thereto, the administrator shall promptly reimburse the holder for the payment without imposing any fee or other charge. If reimbursement is sought for a payment made on a negotiable instrument, including a travelers check or money order, the holder must be reimbursed under this subsection upon filing proof that the instrument was duly presented and that payment was made to a person who appeared to the holder to be entitled to payment. The holder must be reimbursed for payment made under this subsection even if the payment was made to a person whose claim was barred under Section 29(a).

(c) A holder who has delivered property (including a certificate of any interest in a business association) other than money to the administrator pursuant to this Act may reclaim the property if still in the possession of the administrator, without paying any fee or other charge, upon filing proof that the owner has claimed the property from the holder.

(d) The administrator may accept the holder's affidavit as sufficient proof of the facts that entitle the holder to recover money and property under this section.

(e) If the holder pays or delivers property to the administrator in good faith and thereafter another person claims the property from the holder or another state claims the money or property under its laws relating to escheat or abandoned or unclaimed property, the administrator, upon written notice of the claim, shall defend the holder against the claim and indemnify the holder against any liability on the claim.

(f) For the purposes of this section, "good faith" means that

(1) payment or delivery was made in a reasonable attempt to comply with this Act;

(2) the person delivering the property was not a fiduciary then in breach of trust in respect to the property and had a reasonable basis for believing, based on the facts then known to him, that the property was abandoned for the purposes of this Act; and

(3) there is no showing that the records pursuant to which the delivery was made did not meet reasonable commercial standards of practice in the industry.

(g) Property removed from a safe deposit box or other safe-keeping repository is received by the administrator subject to the holder's right under this subsection to be reimbursed for the actual cost of the opening and to any valid lien or contract providing for the holder to be re-

imbursed for unpaid rent or storage charges. The administrator shall reimburse or pay the holder out of the proceeds remaining after deducting the administrator's selling cost.

* * * * *

§ 25. [Claim of Another State to Recover Property; Procedure]

(a) At any time after property has been paid or delivered to the administrator under this Act another state may recover the property if:

(1) the property was subjected to custody by this State because the records of the holder did not reflect the last known address of the apparent owner when the property was presumed abandoned under this Act, and the other state establishes that the last known address of the apparent owner or other person entitled to the property was in that state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(2) the last known address of the apparent owner or other person entitled to the property, as reflected by the records of the holder, is in the other state and under the laws of that state the property has escheated to or become subject to a claim of abandonment by that state;

(3) the records of the holder were erroneous in that they did not accurately reflect the actual owner of the property and the last known address of the actual owner is in the other state and under the laws of that state the property escheated to or was subject to a claim of abandonment by that state;

(4) the property was subjected to custody by this State under Section 3(b) and under the laws of the state of domicile of the holder the property has

escheated to or become subject to a claim of abandonment by that state; or

(5) the property is the sum payable on a travelers check, money order, or other similar instrument that was subjected to custody by this State under Section 4, and the instrument was purchased in the other state, and under the laws of that state the property escheated to or became subject to a claim of abandonment by that state.

(b) The claim of another state to recover escheated or abandoned property must be presented in a form prescribed by the administrator, who shall decide the claim within 90 days after it is presented. The administrator shall allow the claim if he determines that the other state is entitled to the abandoned property under subsection (a).

(c) The administrator shall require a state, before recovering property under this section, to agree to indemnity this State and its officers and employees against any liability on a claim for the property.

§ 26. [Action to Establish Claim]

A person aggrieved by a decision of the administrator or whose claim has not been acted upon within 90 days after its filing may bring an action to establish the claim in the [ ] court, naming the administrator as a defendant. The action must be brought within [90] days after the decision of the administrator or within [180] days after the filing of the claim if he has failed to act on it. [If the aggrieved person establishes the claim in an action against the administrator, the court shall award him costs and reasonable attorney's fees.]

* * * *

§ 33. [Interstate Agreements and Cooperation; Joint and Reciprocal Actions With Other States]

(a) The administrator may enter into agreements with other states to exchange information needed to enable this or another state to audit or otherwise determine unclaimed property that it or another state may be entitled to subject to a claim of custody. The administrator by rule may require the reporting of information needed to enable compliance with agreements made pursuant to this section and prescribe the form.

(b) To avoid conflicts between the administrator's procedures and the procedures of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act, the administrator, so far as is consistent with the purposes, policies, and provisions of this Act, before adopting, amending or repealing rules, shall advise and consult with administrators in other jurisdictions that enact substantially the Uniform Unclaimed Property Act and take into consideration the rules of administrators in other jurisdictions that enact the Uniform Unclaimed Property Act.

(c) The administrator may join with other states to seek enforcement of this Act against any person who is or may be holding property reportable under this Act.

(d) At the request of another state, the attorney general of this State may bring an action in the name of the administrator of the other state in any court of competent jurisdiction to enforce the unclaimed property laws of the other state against a holder in this State of property subject to escheat or a claim of abandonment by the other state, if the other state has agreed to pay expenses incurred by the attorney general in bringing the action.

(e) The administrator may request that the attorney general of another state or any other person bring an action in the name of the administrator in the other state. This State shall pay all expenses including attor-

ney's fees in any action under this subsection. [The administrator may agree to pay the person bringing the action attorney's fees based in whole or in part on a percentage of the value of any property recovered in the action.] Any expenses paid pursuant to this subsection may not be deducted from the amount that is subject to the claim by the owner under this Act.

* * * *

B. UNIFORM DISPOSITION OF UNCLAIMED PROPERTY ACT—REVISED 1966 ACT

§ 1. [Definitions and Use of Terms]

As used in this Act, unless the context otherwise requires:

(a) "Banking organization" means any bank, trust company, savings bank [industrial bank, land bank, safe deposit company], or a private banker engaged in business in this state.

(b) "Business association" means any corporation (other than a public corporation), joint stock company, business trust, partnership, or any association for business purposes of two or more individuals.

(c) "Financial organization" means any savings and loan association, building and loan association, credit union, [cooperative bank] or investment company, engaged in business in this state.

(d) "Holder" means any person in possession of property subject to this Act belonging to another, or who is trustee in case of a trust, or is indebted to another on an obligation subject to this Act.

(e) "Life insurance corporation" means any association or corporation transacting within this state the business of insurance on the lives of persons or insurance appertaining thereto, including, but not by way of limitation, endowments and annuities.

(f) "Owner" means a depositor in case of a deposit, a beneficiary in case of a trust, a creditor, claimant, or payee in case of other choses in action, or any person having a legal or equitable interest in property subject to this Act, or his legal representative.

(g) "Person" means any individual, business association, government or political subdivision, public corporation, public authority, estate, trust, two or more persons having a joint or common interest, or any other legal or commercial entity.

(h) "Utility" means any person who owns or operates within this state, for public use, any plant, equipment, property, franchise, or license for the transmission of communications or the production, storage, transmission, sale, delivery, or furnishing of electricity, water, steam, or gas.

* * * *

§ 5. [Undistributed Dividends and Distributions of Business Associations]

Any stock or other certificate of ownership, or any dividend, profit, distribution, interest, payment on principal, or other sum held or owing by a business association for or to a shareholder, certificate holder, member, bondholder, or other security holder, or a participating patron of a cooperative, who has not claimed it, or corresponded in writing with the business association concerning it, within 7 years after the date prescribed for payment or delivery, is presumed abandoned if:

(a) It is held or owing by a business association organized under the laws of or created in this state; or

(b) It is held or owing by a business association doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state.

* * * *

§ 7. [Property Held by Fiduciaries]

All intangible personal property and any income or increment thereon, held in a fiduciary capacity for the benefit of another person is presumed abandoned unless the owner has, within 7 years after it becomes payable or distributable, increased or decreased the principal, accepted payment of principal or income, corresponded in writing concerning the property, or otherwise indicated an interest as evidenced by a memorandum on file with the fiduciary:

(a) If the property is held by a banking organization or a financial organization, or by a business association organized under the laws of or created in this state; or

(b) If it is held by a business association, doing business in this state, but not organized under the laws of or created in this state, and the records of the business association indicate that the last known address of the person entitled thereto is in this state; or

(c) If it is held in this state by any other person.

* * * *

§ 9. [Miscellaneous Personal Property Held for Another Person]

All intangible personal property, not otherwise covered by this Act, including any income or increment thereon and deducting any lawful charges, that is held or owing in this state in the ordinary course of the holder's business and has remained unclaimed by the owner for more than 7 years after it became payable or distributable is presumed abandoned.

§ 10. [Reciprocity for Property Presumed Abandoned or Escheated Under the Laws of Another State]

If specific property which is subject to the provisions of sections 2, 5, 6, 7, and 9 is held for or owed or distributable to an owner whose last known address is in

another state by a holder who is subjected to the jurisdiction of that state, the specific property is not presumed abandoned in this state and subject to this act if:

(a) It may be claimed as abandoned or escheated under the laws of such other state; and

(b) The laws of such other state make reciprocal provision that similar specific property is not presumed abandoned or escheatable by such other state when held for or owed or distributable to an owner whose last known address is within this state by a holder who is subject to the jurisdiction of this state.

§ 11. [Report of Abandoned Property]

(a) Every person holding funds or other property, tangible or intangible, presumed abandoned under this Act shall report to the [State Treasurer] with respect to the property as hereinafter provided.

(b) The report shall be verified and shall include:

(1) except with respect to traveler's checks and money orders, the name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of any property of the value of [$3.00] or more presumed abandoned under this Act;

(2) in case of unclaimed funds of life insurance corporations, the full name of the insured or annuitant and his last known address according to the life insurance corporation's records;

(3) the nature and identifying number, if any, or description of the property and the amount appearing from the records to be due, except that items of value under [$3.00] each may be reported in aggregate;

(4) the date when the property became payable, demandable, or returnable, and the date of the last transaction with the owner with respect to the property; and

(5) other information which the [State Treasurer] prescribes by rule as necessary for the administration of this Act.

(c) If the person holding property presumed abandoned is a successor to other persons who previously held the property for the owner, or if the holder has changed his name while holding the property, he shall file with his report all prior known names and addresses of each holder of the property.

(d) The report shall be filed before November 1 of each year as of June 30 next preceding, but the report of life insurance corporations shall be filed before May 1 of each year as of December 31 next preceding. The [State Treasurer] may postpone the reporting date upon written request by any person required to file a report.

(e) If the holder of property presumed abandoned under this Act knows the whereabouts of the owner and if the owner's claim has not been barred by the statute of limitations, the holder shall, before filing the annual report, communicate with the owner and take necessary steps to prevent abandonment from being presumed. The holder shall exercise due diligence to ascertain the whereabouts of the owner.

(f) Verification, if made by a partnership, shall be executed by a partner; if made by an unincorporated association or private corporation, by an officer; and if made by a public corporation, by its chief fiscal officer.

(g) The initial report filed under this Act shall include all items of property that would have been presumed abandoned if this Act had been in effect during the 10 year period preceding its effective date.

* * * *

§ 13. [Payment or Delivery of Abandoned Property]

Every person who has filed a report under section 11, within [20] days after the time specified in section 12

for claiming the property from the holder, or in the case of sums payable on traveler's checks or money orders presumed abandoned under section 2 within [20] days after the filing of the report, shall pay or deliver to the [State Treasurer] all abandoned property specified in this report, except that, if the owner establishes his right to receive the abandoned property to the satisfaction of the holder within the time specified in section 12, or if it appears that for some other reason the presumption of abandonment is erroneous, the holder need not pay or deliver the property, which will no longer be presumed abandoned, to the [State Treasurer], but in lieu thereof shall file a verified written explanation of the proof of claim or of the error in the presumption of abandonment.

§ 14. [Relief from Liability by Payment or Delivery]

Upon the payment or delivery of abandoned property to the [State Treasurer], the state shall assume custody and shall be responsible for the safekeeping thereof. Any person who pays or delivers abandoned property to the [State Treasurer] under this Act is relived of all liability to the extent of the value of the property so paid or delivered for any claim which then exists or which thereafter may arise or be made in respect to the property. Any holder who has paid moneys to the [State Treasurer] pursuant to this Act may make payment to any person appearing to such holder to be entitled thereto, and upon proof of such payment and proof that the payee was entitled thereto, the [State Treasurer] shall forthwith reimburse the holder for the payment.

C. UNIFORM COMMERCIAL CODE

§ 8-207. Rights and Duties of Issuer With Respect to Registered Owners and Registered Pledgees.

(1) Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner.

(2) Subject to the provisions of subsections (3), (4), and (6), the issuer or indenture trustee may treat the registered owner of an uncertificated security as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner.

(3) The registered owner of an uncertificated security that is subject to a registered pledge is not entitled to registration of transfer prior to the due presentment to the issuer of a release instruction. The exercise of conversion rights with respect to a convertible uncertificated security is a transfer within the meaning of this section.

(4) Upon due presentment of a transfer instruction from the registered pledgee of an uncertificated security, the issuer shall:

(a) register the transfer of the security to the new owner free of pledge, if the instruction specifies a new owner (who may be the registered pledgee) and does not specify a pledgee;

(b) register the transfer of the security to the new owner subject to the interest of the existing pledgee, if the instruction specifies a new owner and the existing pledgee; or

(c) register the release of the security from the existing pledge and register the pledge of the

security to the other pledgee, if the instruction specifies the existing owner and another pledgee.

(5) Continuity of perfection of a security interest is not broken by registration of transfer under subsection (4)(b) or by registration of release and pledge under subsection (4)(c), if the security interest is assigned.

(6) If an uncertificated security is subject to a registered pledge:

(a) any uncertificated securities issued in exchange for or distributed with respect to the pledged security shall be registered subject to the pledge;

(b) any certificated securities issued in exchange for or distributed with respect to the pledged security shall be delivered to the registered pledgee; and

(c) any money paid in exchange for or in redemption of part or all of the security shall be paid to the registered pledgee.

(7) Nothing in this Article shall be construed to affect the liability of the registered owner of a security for calls, assessments, or the like.

* * * *

§ 9-103. Perfection of Security Interest in Multiple State Transactions.

* * * *

(3) Accounts, general intangibles and mobile goods.

(a) This subsection applies to accounts (other than an account described in subsection (5) on minerals) and general intangibles (other than uncertificated securities) and to goods which are mobile and which are of a type normally used in more than one jurisdiction, such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting

machinery and the like, if the goods are equipment or are inventory leased or held for lease by the debtor to others, and are not covered by a certificate of title described in subsection (2).

(b) The law (including the conflict of laws rules) of the jurisdiction in which the debtor is located governs the perfection and the effect of perfection or non-perfection of the security interest.

(c) If, however, the debtor is located in a jurisdiction which is not a part of the United States, and which does not provide for perfection of the security interest by filing or recording in that jurisdiction, the law of the jurisdiction in the United States in which the debtor has its major executive office in the United States governs the perfection and the effect of perfection or non-perfection of the security interest through filing. In the alternative, if the debtor is located in a jurisdiction which is not a part of the United States or Canada and the collateral is accounts or general intangibles for money due or to become due, the security interest may be perfected by notification to the account debtor. As used in this paragraph, "United States" includes its territories and possessions and the Commonwealth of Puerto Rico.

(d) A debtor shall be deemed located at his place of business if he has one, at his chief executive office if he has more than one place of business, otherwise at his residence. If, however, the debtor is a foreign air carrier under the Federal Aviation Act of 1958, as amended, it shall be deemed located at the designated office of the agent upon whom service of process may be made on behalf of the foreign air carrier.

(e) A security interest perfected under the law of the jurisdiction of the location of the debtor is perfected until the expiration of four months after a change of the debtor's location to another jurisdiction,

or until perfection would have ceased by the law of the first jurisdiction, whichever period first expires. Unless perfected in the new jurisdiction before the end of that period, it becomes unperfected thereafter and is deemed to have been unperfected as against a person who became a purchaser after the change.

(4) Chattel paper.

The rules stated for goods in subsection (1) apply to a possessory security interest in chattel paper. The rules stated for accounts in subsection (3) apply to a non-possessory security interest in chattel paper, but the security interest may not be perfected by notification to the account debtor.

* * * *

(6) Uncertificated securities.

The law (including the conflict of laws rules) of the jurisdiction of organization of the issuer governs the perfection and the effect of perfection or non-perfection of a security interest in uncertificated securities.

D. MODEL BUSINESS CORPORATION ACT
(1984 Version)

§ 1.40. DEFINITIONS

(21) "Shareholder" means the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation.

§ 7.07. RECORD DATE

(a) The bylaws may fix or provide the manner of fixing the record date for one or more voting groups in order to determine the shareholders entitled to notice of a shareholders' meeting, to demand a special meeting, to vote, or to take any other action. If the bylaws do not fix or provide for fixing a record date, the board of directors of the corporation may fix a future date as the record date.

(b) A record date fixed under this section may not be more than 70 days before the meeting or action requiring a determination of shareholders.

(c) A determination of shareholders entitled to notice of or to vote at a shareholders' meeting is effective for any adjournment of the meeting unless the board of directors fixes a new record date, which it must do if the meeting is adjourned to a date more than 120 days after the date fixed for the original meeting.

(d) If a court orders a meeting adjourned to a date more than 120 days after the date fixed for the original meeting, it may provide that the original record date continues in effect or it may fix a new record date.

§ 7.23. SHARES HELD BY NOMINEES

(a) A corporation may establish a procedure by which the beneficial owner of shares that are registered in the name of a nominee is recognized by the corporation as the shareholder. The extent of this recognition may be determined in the procedure.

(b) The procedure may set forth:

(1) the types of nominees to which it applies;

(2) the rights or privileges that the corporation recognizes in a beneficial owner;

(3) the manner in which the procedure is selected by the nominee;

(4) the information that must be provided when the procedure is selected;

(5) the period for which selection of the procedure is effective; and

(6) other aspects of the rights and duties created.

IV. NEW YORK ABANDONED PROPERTY LAW

ARTICLE V—UNCLAIMED PROPERTY HELD OR OWING FOR PAYMENT TO SECURITY HOLDERS

§ 500. Definitions

When used in this article, the following terms shall have the following meanings:

1. (a) "Corporation" shall mean any corporation (other than a public corporation as defined in paragraph (b) of this subdivision), joint stock company, association of two or more individuals, committee, partnership, investment company (as defined by, and which is registered under, an act of Congress of the United States entitled the "Investment Company Act of 1940", as amended), unit investment trust or business trust, whether or not for profit.

(b) "Public corporation" shall mean any state and a public corporation as defined in section sixty-six of the general construction law, but shall not mean an agency or political subdivision of the United States or of a foreign nation.

2. "Security" shall mean:

(a) Any instrument issued by a corporation or public corporation or any entry on the books and records of such corporation or public corporation evidencing an obligation to make any payment of the principal amount of a debt or of any increment due or to become due thereon; or

(b) Any instrument issued by a corporation to evidence a proprietary interest therein or any intangible interest in a corporation as evidenced by the books and records of the corporation except:

(i) A policy of insurance issued by a mutual insurance corporation, or

(ii) A share issued by a savings and loan association, a building and loan association, or a credit union.

For the purposes of this article, an industrial development bond or an industrial revenue bond shall be deemed a security issued by a public corporation.

3. "Domestic corporation" shall mean any corporation organized under the laws of this state or under the laws of this state and one or more other states or foreign countries, but shall not mean a banking organization as defined in this chapter.

4. "Foreign corporation" shall mean any corporation organized under the laws of a state other than New York or under the laws of a foreign country and doing business in this state or authorized to do business in this state, but shall not mean a banking organization as defined in this chapter. "Non-authorized foreign corporation" shall mean any corporation organized under the laws of a state other than New York which is neither doing business nor authorized to do business in this state.

5. "Fiduciary" shall mean any individual or any domestic or foreign corporation holding a security for a resident or receiving, as agent of a corporation or as holder of a security, any amount due or to become due a resident as the holder or owner of a security but shall not mean any individual or corporation so acting by direction of a court in any case where such court has not directed a distribution of such amount or security.

6. "Resident" shall mean:

(a) An individual domiciled in this state;

(b) A domestic corporation;

(c) A banking organization, as defined in section one hundred three of this chapter; and

(d) This state and any public corporation organized under its laws.

7. (a) "Amount" shall include, but is not limited to, any dividend, profit or other distribution, whether in cash

or securities, and any interest or other payment on or of principal, including the cash value of any security which has matured or has been called for full or partial redemption or is payable to security owners or former security owners entitled to payments as the result of a merger, consolidation, acquisition or conversion of any type.

(b) An amount is deemed to be "distributable" or "payable" for the purposes of this article notwithstanding any requirement that a security or other instrument must be presented, exchanged or surrendered, or that an owner must affirmatively make any claim for payment, before actual payment of such amount may be effected.

8. "Wages" shall include moneys payable, under contract or otherwise, for services rendered to a domestic or foreign corporation or fiduciary, including but not limited to payment of salaries, commissions, royalties, expenses, employee benefits, and insurance benefits payable by a corporation pursuant to a self-insurance plan, less lawful deductions.

§ 501. Unclaimed property; when deemed abandoned

1. (a) Any amount which, on or after January first, nineteen hundred forty-seven, shall have become payable or distributable by a domestic, foreign or public corporation or by a fiduciary to a resident as the owner or former owner of a security as defined in paragraph (a) of subdivision two of section five hundred of this article, shall be deemed abandoned when the security with respect to which such amount is payable or distributable has been deemed abandoned, or when such amount:

(i) is payable or distributable to such resident as the owner or former owner of such security; and

(ii) has, on the thirty-first day of December in any year, remained unpaid to or unclaimed by such resident for a period of three years. For the purposes of this article, a security as defined in paragraph (a) of sub-

division two of section five hundred of this article shall not be deemed abandoned until a period of three years has elapsed from the earlier of the maturity date of such security or the date such security has been called for redemption.

(b) Any amount which, on or after January first, nineteen hundred forty-seven shall have become payable or distributable by a domestic or foreign corporation or a fiduciary to a resident as the owner or former owner of a security as defined in paragraph (b) of subdivision two of section five hundred of this article, shall be deemed abandoned when the security with respect to which such amount is payable or distributable has been deemed abandoned or when such amount:

(i) is payable or distributable to such resident as the owner or former owner of such security; and

(ii) has, on the thirty-first day of December in any year, remained unpaid to or unclaimed by such resident for a period of five years.

2. (a) Except as provided in paragraph (b) of this subdivision, any security, as defined in paragraph (b) of subdivision two of section five hundred of this article, of any domestic corporation or foreign corporation owned by or formerly owned by a resident shall be deemed abandoned where, for five successive years:

(i) all amounts, if any, payable or distributable thereon or with respect thereto have remained unpaid to or unclaimed by such resident, and

(ii) no written communication has been received from such resident by the holder.

(b) (i) Any security, as defined in paragraph (b) of subdivision two of section five hundred of this article, of any domestic or foreign corporation in which a resident has an ownership interest and which is enrolled in a plan that provides for the automatic reinvestment of dividends,

distributions, or other sums payable as the result of such interest shall be deemed abandoned when any security owned by such resident which is not enrolled in the plan has been deemed abandoned pursuant to paragraph (a) of this subdivision or when, for five successive years:

(1) all amounts, if any, payable thereon or with respect thereto have remained unpaid to or unclaimed by such resident, and

(2) no written communication has been received from such resident by the holder, and

(3) the holder does not know the location of such resident at the end of such five year period.

(ii) For purposes of this paragraph, the reinvestment of any dividend, distribution or other sum payable shall not be considered as payment of an amount for the purpose of extending the statutory period of inactivity after the expiration of which securities enrolled in a reinvestment plan are deemed abandoned.

(iii) Any corporation or fiduciary holding or evidencing on its books and records securities enrolled in a reinvestment plan shall notify the apparent owner by certified mail that such securities will be delivered to the state comptroller as abandoned property, pursuant to the provisions of section five hundred two of this article, unless such corporation or fiduciary receives written communication from the apparent owner of such securities indicating knowledge of such securities prior to the date that such securities are required to be delivered to the state comptroller. Such letter by certified mail shall be sent during the calendar year prior to the year in which such property would be required to be delivered to the state comptroller, but no later than the thirty-first day of December of such year. For purposes of this subdivision, a signed return receipt shall constitute written communication received by the holder from the apparent owner.

(iv) All corporations or fiducaries holding or evidencing on its books and records securities enrolled in a reinvestment plan shall retain, for a period of five years following the thirty-first day of December of the year for which a report of abandoned property has been filed, a list of (1) the dates and nature of any and all corporate notices which have been sent via first class mail to owners of such securities during the period to which such report relates, and (2) the names and addresses of all owners of such securities for whom postal authorities have returned any first class mail sent by the holder during the period to which such report relates, and the dates on which such mail was returned for each such owner. Nothing contained herein or in any other provision of this chapter shall preclude the state comptroller, in the performance of his duties under this chapter, from verifying that all such notices have been sent and whether or not such notices have been returned to the holder by the postal authorities.

3. Any wages payable on or after July first, nineteen hundred sixty-three by a domestic or foreign corporation and held for a resident by such issuing corporation or held and payable by a fiduciary other than a broker or dealer as defined in section five hundred ten of this chapter for a resident shall be deemed to be abandoned property, where for three successive years:

(a) All such wages have remained unpaid to such resident, and

(b) No written communication has been received from such resident by the holder, and

(c) Notice regarding such wages has been sent by the corporation or fiduciary, via first class mail, to such resident at his last known address and such notice has been returned to the corporation or fiduciary by the postal authorities for inability to locate such resident.

4. For the purposes of this section the holder or owner of a security or payee of an amount or a payee of wages

shall be deemed to be a resident when the records of the corporation or fiduciary indicate that the last known address of such holder, owner or payee is located within this state or, if the security was issued or the amount or wages were payable by a domestic corporation or a public corporation organized under the laws of this state, when such records do not indicate a last known address outside this state or when the address of such holder, owner or payee is unknown to such corporation or public corporation or fiduciary; or when the address of such holder, owner or payee is in a state not having a law relating to the disposition of abandoned property; or when the address of such holder, owner or payee is in a foreign country.

5. Any amount, wages or security with respect to which such domestic or foreign corporation or public corporation or fiduciary has on file written evidence received within the period specified for determining abandonment of such property that the person entitled to such amount or wages or for whom such security is held had knowledge thereof shall not be deemed abandoned property.

§ 502. Payment or delivery of abandoned property

1. In the month of March in each year, and on or before the tenth day thereof, every domestic or foreign corporation or public corporation or fiduciary shall pay or deliver to the state comptroller all property which on the preceding thirty-first day of December was deemed abandoned pursuant to section five hundred one excepting such property as since that date has ceased to be abandoned.

2. Where any security delivered to the state comptroller pursuant to subdivision one hereof, is delivered by him to the issuing corporation, the security shall be transferred to him on the books of the corporation and a certificate registered in the name of the state comptroller shall be delivered to him or, if so requested by the comp-

troller, such corporation shall register such securities in book entry form in the name of the comptroller. The corporation and its transfer agent, registrar or other person acting for or on behalf of the corporation in executing or delivering any such certificate or registering such securities shall be relieved from liability to any person for any losses or damages resulting from the issuance and delivery to the state comptroller of such certificate or registration of such securities.

§ 503. Report of abandoned property

Each payment or delivery of abandoned property pursuant to section five hundred two shall be accompanied by a verified written report, in such form as the state comptroller shall prescribe, setting forth:

(a) The name and last known address, if any, of the person appearing to be entitled to such abandoned property;

(b) A description of such abandoned property;

(c) The number of shares represented or the face amount of the security;

(d) The amount of any principal, dividend, interest or other increment due thereon;

(e) The date such amount was demandable or payable; and

(f) Such other identifying information as the state comptroller may require.

§ 504. Reimbursement for property paid or delivered

A domestic or foreign corporation or public corporation or a fiduciary which has paid or delivered to the state comptroller abandoned property pursuant to section five hundred two may make payment to the person entitled thereto, and may file claim for reimbursement for such payment by the state comptroller, who shall, upon

satisfactory proof of such payment and after audit, reimburse such domestic or foreign corporation or public corporation or fiduciary. In no event, however, shall such reimbursement exceed the amount to which the claimant is entitled pursuant to subdivision two of section fourteen hundred three of this chapter.

ARTICLE V-A—UNCLAIMED PROPERTY HELD BY BROKERS

§ 510. Definitions

When used in this article, the following items shall have the following meanings:

1. "Corporation" shall include any joint stock company, corporation, association of two or more individuals, committee, public authority, or business trust.

2. "Public issuer" shall include the United States, the several states and territories thereof, political subdivisions and municipal corporations within such states and territories, foreign countries and political subdivisions and municipal corporations within such foreign countries.

3. "Security" shall include:

(a) Any instrument issued by a corporation or public issuer to evidence an obligation to make any payment of the principal amount of a debt or of any increment due or to become due thereon, or

(b) Any instrument issued by a corporation to evidence a proprietary interest therein except:

(i) A policy of insurance issued by a mutual insurance corporation, or

(ii) A share issued by a savings and loan association, a building and loan association, or a credit union.

4. "Broker" shall include any individual or corporation engaging in the purchase, sale or exchange of securities for or on behalf of any customer.

5. "Dealer" shall include any individual or corporation engaging in any state as a regular business in the purchase, sale or exchange of securities for his or its own account, through a broker or otherwise.

6. (a) "Customer" shall include any individual or corporation entering into a contract with a broker or dealer by which such broker or dealer agrees to effect the purchase, sale, or exchange, or to keep custody of any security for or on behalf of such individual or corporation. The term "customer" shall also include any individual or corporation entering into a contract with a broker or dealer whereby such broker or dealer for his own account buys from or sells to such individual or corporation, any security.

(b) If on the books of account located at an office in this state of a broker or dealer there is indicated a balance to the credit of an individual or corporation with a last-known address in a state other than this state, such individual or corporation shall not be deemed a "customer".

7. "Amount" shall mean that term as defined in subdivision seven of section five hundred of this chapter.

8. "Wages" shall include moneys payable, under contract or otherwise, for services rendered to a broker or dealer, less lawful deductions.

§ 511. Unclaimed property; when deemed abandoned

The following unclaimed property shall be deemed abandoned property:

1. Any amount (a) received in this state after June thirtieth, nineteen hundred forty-six by a broker or dealer or nominee of such broker or dealer as the holder of record of a security remaining unpaid to the person entitled thereto for three years following the receipt thereof, or (b) when paid to such broker, dealer or nominee on or with respect to a security which has been deemed abandoned.

1-a. Any amount (a) received in this state on or after July first, nineteen hundred seventy-four by a broker or dealer or nominee of such broker or dealer other than as the holder of record of a security remaining unpaid to the person entitled thereto for three years following the receipt thereof, or (b) when paid to such broker, dealer or nominee on or with respect to a security which has been deemed abandoned.

2. Any amount (a) received in this state after June thirtieth, nineteen hundred forty-six due from a broker or dealer or nominee of such broker or dealer to a customer which has remained unpaid to the customer for three years after the date of the last entry, other than the receipt of dividends or interest in the account of such broker, dealer or nominee with such customer, or (b) payable on or with respect to a security which has been deemed abandoned.

3. Any security held in this state by a broker or dealer, or nominee of such broker or dealer, as the holder of record of a security for a customer or for a person or persons unknown to such broker or dealer or nominee where, for three successive years, all amounts paid thereon or with respect thereto and received after June thirtieth, nineteen hundred forty-six by such broker or dealer or nominee have remained unclaimed.

Provided, however, that if any amount or security specified in subdivision one, two or three of this section is reflected, recorded or included in an account with respect to which such broker or dealer has on file evidence in writing received within the three years immediately preceding the thirty-first day of December preceding the date such amount or security would otherwise be payable or deliverable pursuant to section five hundred twelve that the person entitled thereto had knowledge of such account, then such amount or security shall not be deemed abandoned property.

4. Any security held by a broker or dealer or nominee of such broker or dealer reflected, recorded, or included in an account with respect to which, for three successive years, all statements of account or other communications which have been sent, via first class mail, to the customer at his last known address have been returned to such broker, dealer or nominee by the postal authorities for inability to locate the customer, and no written communication has been received from the customer by such broker, dealer or nominee, provided such security was received or is held in this state by such broker, dealer or nominee or the last known address of the customer is located in this state.

5. Any wages held and payable on or after July first, nineteen hundred sixty-six by a broker or dealer, as defined in section five hundred ten of this article, for the benefit of a person or persons, known or unknown, shall be deemed to be abandoned property, where for three successive years:

(a) All such wages have remained unpaid to such person, and

(b) No written communication has been received from such person by the holder, and

(c) Notice regarding such wages, if sent by the broker or dealer, via first class mail, to such person at his last known address has been returned to the broker or dealer by the postal authorities for inability to locate such person.

6. Any broker or dealer who satisfies the requirements of this subdivision may determine the property which on the thirty-first day of December in the years nineteen hundred seventy-two, nineteen hundred seventy-three, nineteen hundred seventy-four and nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine, and nineteen

hundred seventy by the method hereinafter in this subdivision described and the amount so determined as at any such date shall be deemed to be all of such abandoned property held by such broker or dealer pursuant to subdivisions one and three of this section on such date.

The broker or dealer shall compute separately for each of the years nineteen hundred sixty-five and nineteen hundred sixty-six (each of which years is referred to in this subdivision as a "base year") the total value of all stock and cash dividends received by such broker or dealer, or nominee of such broker or dealer, in this state during such year as the holder of record of a security. The value of any dividend paid in stock shall be the mean price of such stock during the calendar month in which the dividend was received as reported by any generally recognized statistical service or, if not so reported, as established in any other manner satisfactory to the state comptroller. The total value of all such stock and cash dividends thus determined for each base year shall be the denominator for that base year. The broker or dealer shall then determine the total value of all such dividends received during each base year belonging to unknown owners as reported to the state comptroller, or as required to be so reported pursuant to this article, which continued to be held by such broker or dealer, or nominee of such broker or dealer, unpaid to the person entitled thereto on the December thirty-first occurring five years after the close of such base year. To the extent any such dividends which continued to be so held unpaid on any such December thirty-first consisted of stock, such stock shall be valued at the mean price of such stock during the calendar month ending on such December thirty-first as reported by any generally recognized statistical service or, if not so reported, as established in any other manner satisfactory to the state comptroller. The total value of such remaining dividends thus determined for each

base year shall be the numerator for that base year. The sum of the numerators for the base years shall be divided by the sum of the denominators for the base years and the result thus obtained shall be multiplied by two. The product obtained as the result of such multiplication shall be the average factor of such broker or dealer.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-two shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-seven the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during ninteen hundred sixty-seven as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-two in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-seven but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-seven on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-two in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-

seven but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-seven on the thirty-first day of December nineteen hundred seventy-two.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-three in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-eight but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-eight on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-

first day of December, nineteen hundred seventy-three in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-eight but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight on the thirty-first day of December, nineteen hundred seventy-three.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-four shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-nine the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, ~~in~~ this state during nineteen hundred sixty-nine as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-four in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-nine but, according to the books and records of such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in

this state during nineteen hundred sixty-nine on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-four in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred sixty-nine but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-nine on the thirty-first day of December nineteen hundred seventy-four.

In order to determine the property which on the thirty-first day of December, nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred seventy the broker or dealer shall determine (i) the total value of all stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred seventy as the holder of record of a security and shall multiply such total value by the average factor of such broker or dealer, (ii) the aggregate amount of stock and cash dividends (valued as above provided) received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred seventy as the holder of record of a security for a person or persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-five in covering stock and cash dividends which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred seventy but, according to the books and records of

such broker or dealer, were not received, and (iii) the aggregate amount of interest payments received by such broker or dealer, or nominee of such broker or dealer, in this state during nineteen hundred sixty-nine on securities held for persons unknown to such broker or dealer, less the cost incurred by such broker or dealer not later than the thirty-first day of December, nineteen hundred seventy-five in covering interest payments which should have been received by such broker or dealer, or nominee of such broker or dealer, during nineteen hundred seventy but, according to the books and records of such broker or dealer, were not received. The greater of the two amounts determined pursuant to clauses (i) and (ii) of the preceding sentence, plus the amount determined pursuant to clause (iii) of such sentence, shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred seventy on the thirty-first day of December, nineteen hundred seventy-five.

Each broker or dealer which uses the procedure described above in this subdivision shall maintain for a period of not less than six years commencing January first, nineteen hundred seventy-two, books and records evidencing the receipt of dividends in this state for each of the base years, and the payment thereof over the five years succeeding each base year.

Any broker or dealer who chooses to determine the property which on the thirty-first day of December in the years nineteen hundred seventy-two or nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-seven or nineteen hundred sixty-eight by the method described in this subdivision shall thereafter determine the property which on the thirty-first day of December in each subsequent year ending not later than December thirty-first, nineteen hundred seventy-five shall be deemed abandoned property

pursuant to subdivisions one and three of this section relating to a year not later than nineteen hundred seventy by the method described in this subdivision. No broker or dealer may choose to determine the property which on the thirty-first day of December in the years nineteen hundred seventy-four or nineteen hundred seventy-five shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the years nineteen hundred sixty-nine or nineteen hundred seventy by the method described in this subdivision unless such broker or dealer shall have used the method described in this subdivision to determine the property which on the thirty-first day of December in the year nineteen hundred seventy-three shall be deemed abandoned property pursuant to subdivisions one and three of this section relating to the year nineteen hundred sixty-eight.

The method of determining abandoned property pursuant to subdivisions one and three of this section as described in this subdivision shall be available only to such brokers or dealers as have made written reports pursuant to section five hundred thirteen in each of the years nineteen hundred seventy-one and nineteen hundred seventy-two covering each of the base years.

In the event that an audit of a broker or dealer by the state comptroller establishes that one or more of the dollar values determined by the broker or dealer for the purpose of computing the average factor of such broker or dealer pursuant to this subdivision was incorrect, the corrected average factor of such broker or dealer established as a result of such audit shall be determined to be the average factor required to be used by such broker or dealer in determining abandoned property pursuant to this subdivision.

Any broker or dealer who does not determine abandoned property pursuant to subdivisions one and three of this section by the method described in this subdivision and who during any of the calendar years nineteen hundred

sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy received in this state any stock dividend as the holder of record of a security for a person or persons unknown to such broker or dealer and who sold any such stock dividend during any such or subsequent calendar year, shall pay the proceeds of such sale to the state comptroller not later than the thirty-first day of December, nineteen hundred seventy-three and such proceeds shall, for all purposes of this chapter be deemed abandoned property on the thirty-first day of December of the calendar year during which such sale takes place.

§ 512. Payment or delivery of abandoned property

1. In the month of March of each year, and on or before the tenth day thereof, every broker or dealer shall pay or deliver to the state comptroller all property which on the preceding thirty-first day of December was deemed abandoned property pursuant to section five hundred eleven excepting such property as since that date has ceased to be abandoned.

2. Where any security delivered to the state comptroller pursuant to subdivision one hereof, is delivered by him to the issuing corporation, the security shall be transferred to him on the books of the corporation and a certificate registered in the name of the state comptroller shall be delivered to him. The corporation and its transfer agent, registrar or other person acting for or on behalf of the corporation in executing or delivering such certificate shall be relieved from liability to any person for any losses or damages resulting from the issuance and delivery to the state comptroller of such certificate.

§ 513. Report to accompany payment or delivery

A payment or delivery pursuant to section five hundred twelve shall be accompanied by a verified written report, in such form as the state comptroller may prescribe, setting forth:

1. With reference to any amount specified in subdivision one of section five hundred eleven,

(a) A description of the security,

(b) The number of shares represented or the face amount of the security,

(c) The date the dividend or interest was payable, and

(d) Such other information as the state comptroller may require.

2. With reference to any amount specified in subdivision two of section five hundred eleven,

(a) The name and last known address, if any, of the customer entitled to such amount,

(b) The date of the last entry, other than the credit of interest or dividends, in the account in which such amount is reflected, recorded or included, and

(c) Such other information as the state comptroller may require.

3. With reference to any security specified in subdivision three or four of section five hundred eleven,

(a) A description of the abandoned security,

(b) The number of shares represented or the face amount of the security,

(c) The name and last known address, if any, of the person appearing to be entitled to such abandoned property, and

(d) Such other information as the state comptroller may require.

4. In case any broker or dealer shall on the thirty-first day of December in any year neither hold nor owe any abandoned property specified in section five hundred eleven, such broker or dealer shall on or before the tenth

day of March next succeeding make a verified written report to the State Comptroller so stating.

5. In case any broker or dealer determines the property which shall be deemed abandoned property pursuant to subdivisions one and three of section five hundred eleven by the method provided in subdivision six of that section, the payment of such abandoned property shall be accompanied by a verified written report, in such form as the state comptroller may prescribe, which, among other things, shall set forth the computation of the average factor of such broker or dealer pursuant to subdivision six of section five hundred eleven. Each verified written report accompanying the payment of abandoned property determined pursuant to subdivision six of section five hundred eleven shall contain an undertaking by the broker or dealer making such payment to honor all claims to the extent herein provided whenever made against such broker or dealer by any person determined by him or proved to be entitled to receive from him a stock or cash dividend received in this state during the calendar year covered by such report as the holder of record of a security or an interest payment on a security received in this state during such year. Such undertaking shall obligate the broker or dealer to honor any such claim provided that the payment of abandoned property relating to the year in question determined pursuant to subdivision six of section five hundred eleven made by such broker or dealer to the state comptroller has been exhausted as a result of reimbursements by the state comptroller to the broker or dealer or to other persons claiming such abandoned property as provided in subdivision two of section five hundred fourteen. To the extent related to any stock dividend, any such claim shall not exceed the fair market value of such stock dividend on the thirty-first day of December of the year in which such stock dividend was deemed abandoned property.

§ 513-a. Retention of books and records

1. Every broker or dealer shall retain the books and records set forth in subdivision two of this section relating to the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine and nineteen hundred seventy for a period of ten years following the end of the year in which created; shall retain all such books and records relating to the year nineteen hundred seventy-one for a period of nine years following the close of nineteen hundred seventy-one; and shall retain all such books and records relating to any subsequent calendar year for a period of ten years following the end of the year in which created. The books and records so retained shall be made available to the state comptroller upon his request in the performance of his duties under this chapter.

2. The following books and records shall be those referred to in subdivision one of this section: general ledgers, customers ledgers; daily and weekly stock position records; dividend sheets; cash blotters; purchase and sales blotters; daily journals; bank reconciliations; cancelled checks; claim letters; independent auditor's reports; trial balances; private ledgers; financial statements and supporting data; chart of accounts; and copies of abandoned property reports.

§ 514. Reimbursement of brokers or dealers

1. A broker or dealer which has paid or delivered to the state comptroller abandoned property pursuant to section five hundred twelve may elect to make payment to the person entitled thereto. A broker or dealer making such payment may file claim for reimbursement by the state comptroller. The state comptroller upon satisfactory proof of such payment shall, after audit, reimburse such broker or dealer. In no event, however, shall such reimbursement exceed the amount to which the claimant is entitled pursuant to subdivision two of section fourteen hundred three of this chapter.

2. A broker or dealer which has paid to the state comptroller abandoned property relating to any of the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy, determined pursuant to subdivision six of section five hundred eleven, may elect thereafter to make payment to a person entitled to receive (i) a stock or cash dividend received in this state during any such year by such broker or dealer, or nominee of such broker or dealer, as the holder of record of a security, or (ii) an interest payment on a security received in this state during any such year by such broker or dealer, or nominee of such broker or dealer. A broker or dealer making any such payment may file claim for reimbursement by the state comptroller. Subject to the provisions of this subdivision, the state comptroller upon satisfactory proof that a broker or dealer has made payment to the person entitled thereto shall, after audit of such claim, reimburse such broker or dealer. In no event shall the amount or amounts reimbursed by the state comptroller to a broker or dealer relating to any of the years nineteen hundred sixty-seven, nineteen hundred sixty-eight, nineteen hundred sixty-nine or nineteen hundred seventy, plus amounts paid by the state comptroller to any person claiming such abandoned property relating to any of such years, exceed the amount paid by the broker or dealer to the state comptroller pursuant to subdivision six of section five hundred eleven relating to such year. In no event shall the amount paid by the state comptroller to any person claiming a stock dividend received by a broker or dealer, or nominee of such broker or dealer, in any of such years, or to a broker or dealer in reimbursement of any such claim paid by such broker or dealer, exceed the value of such stock dividend as most recently reported by any generally recognized statistical service on the thirty-first day of December of the year in which such stock was deemed abandoned property.

V. SEC RULES

A. RULES UNDER SECTION 14, SECURITIES EXCHANGE ACT OF 1934

* * * *

14a-7 Mailing communications for security holders.

If the registrant has made or intends to make any solicitation subject to this regulation, the registrant shall perform such of the following acts as may be duly requested in writing with respect to the same subject matter or meeting by any security holder who is entitled to vote on such matter or to vote at such meeting and who shall defray the reasonable expenses to be incurred by the registrant in the performance of the act or acts requested.

(a) The registrant shall mail or otherwise furnish to such security holder the following information as promptly as practicable after the receipt of such request:

(1) A statement of the approximate number of holders of record of any class of securities, any of the holders of which have been or are to be solicited on behalf of the registrant, or any group of such holders which the security holder shall designate.

(2) If the registrant has made or intends to make, through bankers, brokers or other persons any solicitation of the beneficial owners of securities of any class, a statement of the approximate number of such beneficial owners, or any group of such owners which the security holder shall designate.

(3) An estimate of the cost of mailing a specified proxy statement, form of proxy or other communication to such holders, including insofar as known or reasonably available, the estimated handling and mailing costs of the bankers, brokers or other persons specified in paragraph (a)(2) of this section.

(b)(1) Copies of any proxy statement, form of proxy or other communication furnished by the security holder

shall be mailed by the registrant to such of the holders of record specified in paragraph (a)(1) of this section as the security holder shall designate. The registrant shall also mail to each banker, broker, or other person specified in paragraph (a)(2) of this section a sufficient number of copies of such proxy statement, form of proxy or other communication as will enable the banker, broker, or other person to furnish a copy thereof to each beneficial owner solicited or to be solicited through him.

(2) Any such material which is furnished by the security holder shall be mailed with reasonable promptness by the registrant after receipt of a tender of the material to be mailed, of envelopes or other containers therefor and of postage or payment for postage. The registrant need not, however, mail any such material which relates to any matter to be acted upon at an annual meeting of security holders prior to the earlier of (i) a day corresponding to the first date on which the registrant proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, or (ii) the first day on which solicitation is made on behalf of the registrant. With respect to any such material which relates to any matter to be acted upon by security holders otherwise than at an annual meeting, such material need not be mailed prior to the first day on which solicitation is made on behalf of the registrant.

(3) The registrant shall not be responsible for such proxy statement, form of proxy or other communication.

(c) In lieu of performing the acts specified in paragraphs (a) and (b) of this section, the registrant may at its option, furnish promptly to such security holder a reasonably current list of the names and addresses of such of the holders of record specified in paragraph (a)(1) of this section as the security holder shall designate, and a list of the names and addresses of such of the bankers, brokers or other persons specified in paragraph (a)(2) of this section as the security holder shall

designate together with a statement of the approximate number of beneficial owners solicited or to be solicited through each such banker, broker or other person and a schedule of the handling and mailing costs of each such banker, broker or other person if such schedule has been supplied to the registrant. The foregoing information shall be furnished promptly upon the request of the security holder or at daily or other reasonable intervals as it becomes available to the registrant.

* * * *

14a-13 Obligation of registrants in communicating with beneficial owners.

(a) If the registrant knows that securities of any class entitled to vote at a meeting (or by written consents or authorizations if no meeting is held) with respect to which the registrant intends to solicit proxies, consents or authorizations are held of record by a broker, dealer, voting trustee, bank, association, or other entity that exercises fiduciary powers in nominee name or otherwise, the registrant shall:

(1) By first class mail or other equally prompt means:

(i) Inquire of each such record holder:

(A) Whether other persons are the beneficial owners of such securities and if so, the number of copies of the proxy and other soliciting material necessary to supply such material to such beneficial owners;

(B) In the case of an annual (or special meeting in lieu of the annual) meeting, or written consents in lieu of such meeting, at which directors are to be elected, the number of copies of the annual report to security holders necessary to supply such report to beneficial owners to whom such reports are to be distributed by such record holder or its nominee and not by the registrant;

(C) If the record holder has an obligation under Rule 14b-1(b)(3) or Rule 14b-2(b)(4)(ii) and (iii), whether an agent has been designated to act on its behalf

in fulfilling such obligation and, if so, the name and address of such agent; and

(D) Whether it holds the registrant's securities on behalf of any respondent bank and, if so, the name and address of each such respondent bank; and

(ii) Indicate to each such record holder:

(A) Whether the registrant, pursuant to paragraph (c) of this section, intends to distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii);

(B) The record date; and

(C) At the option of the registrant, any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(2) Upon receipt of a record holder's or respondent bank's response indicating, pursuant to Rule 14b-2(b)(1)(i) the names and addresses of its respondent banks, within one business day after the date such response is received, make an inquiry of and give notification to each such respondent bank in the same manner required by paragraph (a)(1) of this section; *Provided, however*, the inquiry required by paragraphs (a)(1) and (a)(2) of this section shall not cover beneficial owners of exempt employee benefit plan securities;

(3) Make the inquiry required by paragraph (a)(1) of this section at least 20 business days prior to the record date of the meeting of security holders, or

(i) If such inquiry is impracticable 20 business days prior to the record date of a special meeting, as many days before the record date of such meeting as is practicable or,

(ii) If consents or authorizations are solicited, and such inquiry is impracticable 20 business days before the earliest date on which they may be used to effect corporate action, as many days before that date as is practicable, or

(iii) At such later time as the rules of a national securities exchange on which the class of securities in question is listed may permit for good cause shown; *Provided, however,* That if a record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, the inquiry shall be made to such designated office(s) or department(s); and

(4) Supply, in a timely manner, each record holder and respondent bank of whom the inquiries required by paragraphs (a)(1) and (a)(2) of this section are made with copies of the proxy, other proxy soliciting material, and/or the annual report to security holders, in such quantities, assembled in such form and at such place(s), as the record holder or respondent bank may reasonably request in order to send such material to each beneficial owner of securities who is to be furnished with such material by the record holder or respondent bank; and

(5) Upon the request of any record holder or respondent bank that is supplied with proxy soliciting material and/or annual reports to security holders pursuant to paragraph (a)(4) of this section, pay its reasonable expenses for completing the mailing of such material to beneficial owners.

NOTE 1: If the registrant's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to Section 17A of the Act (e.g., "Cede & Co.," nominee for the Depository Trust Company), the registrant shall make appropriate inquiry of the clearing agency and thereafter of the participants in such clearing agency who may hold securities on behalf of a beneficial owner or respondent

bank, and shall comply with the above paragraph with respect to any such participant (*see* Rule 14a-1(i)).

NOTE 2: The attention of registrants is called to the fact that each broker, dealer, bank, association and other entity that exercises fiduciary powers has an obligation pursuant to Rule 14b-1 and Rule 14b-2 (except as provided therein with respect to exempt employee benefit plan securities held in nominee name) and, with respect to brokers and dealers, applicable self-regulatory organization requirements to obtain and forward, within the time periods prescribed therein, (a) proxies (or in lieu thereof requests for voting instructions) and proxy soliciting materials to beneficial owners on whose behalf it holds securities, and (b) annual reports to security holders to all beneficial owners on whose behalf it holds securities, unless the registrant has notified the record holder or respondent bank that it has assumed responsibility to mail such material to beneficial owners whose names, addresses and securities positions are disclosed pursuant to Rules 14b-1(c) and 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii).

NOTE 3: The attention of registrants is called to the fact that registrants have an obligation, pursuant to paragraph (d) of this section, to cause proxies (or in lieu thereof requests for voting instructions), proxy soliciting material and annual reports to security holders to be furnished, in a timely manner, to beneficial owners of exempt employee benefit plan securities.

(b) Any registrant requesting pursuant to Rule 14b-1 (b)(3) and Rule 14b-2(b)(4)(ii) and (iii) a list of names, addresses and securities positions of beneficial owners of its securities who either have consented or have not objected to disclosure of such information shall:

(1) By first class mail or other equally prompt means, inquire of each record holder and each respondent bank identified to the registrant pursuant to Rule 14b-2(b)(4)(i) whether such record holder or respondent bank

holds the registrant's securities on behalf of any respondent banks and, if so, the name and address of each such respondent bank;

(2) Request such list to be compiled as of a date no earlier than five business days after the date the registrant's request is received by the record holder or respondent bank; *Provided, however,* That if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such requests, the request shall be made to such designated office(s) or department(s);

(3) Make such request to the following persons that hold the registrant's securities on behalf of beneficial owners: all brokers, dealers, banks, associations and other entities that exercises fiduciary powers; *Provided however,* such request shall not cover beneficial owners of exempt employee benefit plan securities as defined in Rule 14a-1(d)(1); and, at the option of the registrant, such request may give notice of any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(4) Use the information furnished in response to such request exclusively for purposes of corporate communications; and

(5) Upon the request of any record holder or respondent bank to whom such request is made, pay the reasonable expenses, both direct and indirect, of providing beneficial owner information.

NOTE: A registrant will be deemed to have satisfied its obligations under paragraph (b) of this section by requesting consenting and non-objecting beneficial owner lists from a designated agent acting on behalf of the record holder or respondent bank and paying to that designated agent the reasonable expenses of providing the beneficial owner information.

(c) A registrant, at its option, may mail its annual report to security holders to the beneficial owners whose identifying information is provided by record holders and respondent banks, pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii), provided that such registrant notifies the record holders and respondent banks, at the time it makes the inquiry required by paragraph (a) of this section, that the registrant will mail the annual report to security holders to the beneficial owners so identified.

(d) If a registrant solicits proxies, consents or authorizations from record holders and respondent banks who hold securities on behalf of beneficial owners, the registrant shall cause proxies (or in lieu thereof requests or voting instructions), proxy soliciting material and annual reports to security holders to be furnished, in a timely manner, to beneficial owners of exempt employee benefit plan securities.

* * * *

14b-1 Obligation of registered brokers and dealers in connection with the prompt forwarding of certain communications to beneficial owners.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section shall have the same meanings as in the Act and, with respect to proxy soliciting material, as in Rule 14a-1 thereunder and, with respect to information statements, as in Rule 14c-1 thereunder. In addition, as used in this section, the term "registrant" means:

(1) The issuer of a class of securities registered pursuant to Section 12 of the Act; or

(2) An investment company registered under the Investment Company Act of 1940.

(b) *Dissemination and Beneficial Owner Information Requirements.* A broker or dealer registered under Sec-

tion 15 of the Act shall comply with the following requirements for disseminating certain communications to beneficial owners and providing beneficial owner information to registrants:

(1) The broker or dealer shall respond, by first class mail or other equally prompt means, directly to the registrant no later than seven business days after the date it receives an inquiry made in accordance with Rule 14a-13(a) or Rule 14c-7(a) by indicating, by means of a search card or otherwise:

(i) The approximate number of its customers who are beneficial owners of the registrant's securities that are held of record by the broker, dealer or its nominee;

(ii) The number of its customers who are beneficial owners of the registrant's securities who have objected to disclosure of their names, addresses and securities positions if the registrant has indicated, pursuant to Rule 14a-13(a)(1)(ii)(A) or Rule 14c-7(a)(1)(ii)(A), that it will distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to paragraph (c) of this section; and

(iii) The identity of its designated agent, if any, acting on its behalf in fulfilling its obligations under paragraph (b)(3) of this section;

Provided, however, That if the broker or dealer has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, receipt for purposes of paragraph (b)(1) of this section shall mean receipt by such designated office(s) or department(s).

(2) The broker or dealer shall, upon receipt of the proxy, other proxy soliciting material, and/or annual reports to security holders, forward such materials to its customers who are beneficial owners of the registrant's

securities no later than five business days after the receipt of the proxy material or annual reports.

(3) The broker or dealer shall, through its agent or directly:

(i) Provide the registrant, upon the registrant's request, with the names, addresses and securities positions, compiled as of a date specified in the registrant's request which is no earlier than five business days after the date the registrant's request is received, of its customers who are beneficial owners of the registrant's securities and who have not objected to disclosure of such information; *Provided, however*, that if the broker or dealer has informed the registrant that a designated office(s) or department(s) is to receive such requests, receipt shall mean receipt by such designated office(s) or department(s); and

(ii) transmit the data specified in paragraph (b)(3)(i) of this section to the registrant no later than five business days after the record date or other date specified by the registrant.

NOTE 1: Where a broker or dealer employs a designated agent to act on its behalf in performing the obligations imposed on the broker or dealer by paragraph (b)(3) of this section, the five business day time period for determining the date as of which the beneficial owner information is to be compiled is calculated from the date the designated agent receives the registrant's request. In complying with the registrant's request for beneficial owner information under paragraph (b)(3) of this section, a broker or dealer need only supply the registrant with the names, addresses and securities positions of non-objecting beneficial owners.

NOTE 2: If a broker or dealer receives a registrant's request less than five business days before the requested compilation date, it must provide a list compiled as of a date that is no more than five business days after receipt and transmit the list within five business days after the compilation date.

(c) *Exceptions to Dissemination and Beneficial Owner Information Requirements.* A broker or dealer registered under Section 15 of the Act shall be subject to the following with respect to its dissemination and beneficial owner information requirements:

(1) With regard to beneficial owners of exempt employee benefit plan securities, the broker or dealer shall:

(i) Not include information in its response pursuant to paragraph (b)(1) of this section or forward proxies (or in lieu thereof requests for voting instructions), proxy soliciting material, or annual reports to security holders pursuant to paragraph (b)(2) of this section to such beneficial owners; and

(ii) Not include in its response pursuant to paragraph (b)(3) of this section data concerning such beneficial owners.

(2) A broker or dealer need not satisfy

(i) its obligations under paragraphs (b)(2) and (b)(3) of this section if a registrant does not provide assurance of reimbursement of the broker's or dealer's reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2) and (b)(3) of this section;

(ii) its obligation under paragraph (b)(2) of this section to forward annual reports to non-objecting beneficial owners identified by the broker or dealer, through its agent or directly, pursuant to paragraph (b)(3) of this section if the registrant notifies the broker or dealer pursuant to Rule 14a-13(c) or 14c-7(c) that the registrant will mail the annual report to such non-objecting beneficial owners, identified by the broker or dealer and delivered in a list to the registrant pursuant to paragraph (b)(3) of this section.

14b-2 Obligation of banks, associations and other entities that exercise fiduciary powers in connection with the prompt forwarding of certain communications to beneficial owners.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section shall have the same meanings as in the Act and, with respect to proxy soliciting material, as in Rule 14a-1 thereunder and, with respect to information statements, as in Rule 14c-1 thereunder. In addition, as used in this section, the following terms shall apply:

(1) The term "bank" means a bank, association, or other entity that exercises fiduciary powers.

(2) The term "beneficial owner" includes any person who has or shares, pursuant to an instrument, agreement, or otherwise, the power to vote, or to direct the voting of a security.

Notes. 1. If more than one person shares voting power, the provisions of the instrument creating that voting power shall govern with respect to whether consent to disclosure of beneficial owner information has been given.

2. If more than one person shares voting power or if the instrument creating that voting power provides that such power shall be exercised by different persons depending on the nature of the corporate action involved, all persons entitled to exercise such power shall be deemed beneficial owners; *provided, however,* that only one such beneficial owner need be designated among the beneficial owners to receive proxies or requests for voting instructions, other proxy soliciting material, information statements, and/or annual reports to security-holders, if the person so designated assumes the obligation to disseminate, in a timely manner, such materials to the other beneficial owners.

(3) The term "registrant" means:

(i) The issuer of a class of securities registered pursuant to Section 12 of the Act; or

(ii) An investment company registered under the Investment Company Act of 1940.

(b) *Dissemination and Beneficial Owner Information Requirements.* A bank shall comply with the following requirements for disseminating certain communications to beneficial owners and providing beneficial owner information to registrants:

(1) The bank shall: (i) respond, by first class mail or other equally prompt means, directly to the registrant no later than one business day after the date it receives an inquiry made in accordance with Rule 14a-13(a) or Rule 14c-7(a) by indicating the name and address of each of its respondent banks that holds the registrant's securities on behalf of beneficial owners, if any, and

(ii) respond, by first class mail or other equally prompt means, directly to the registrant no later than seven business days after the date it receives an inquiry made in accordance with Rule 14a-13(a) or Rule 14c-7(a) by indicating, by means of a search card or otherwise:

(A) The approximate number of beneficial owners of the registrant's securities;

(B) If the registrant has indicated, pursuant to Rule 14a-13(a)(1)(ii)(A) or Rule 14c-7(a)(1)(ii)(A), that it will distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to paragraphs (b)(4)(ii) and (iii) of this section:

(*1*) With respect to customer accounts opened on or before December 28, 1986, the number of beneficial owners of the registrant's securities who have affirmatively consented to disclosure of their names, addresses and securities positions; and

(*2*) With respect to customer accounts opened after December 28, 1986, the number of beneficial owners of

the registrant's securities who have not objected to disclosure of their names, addresses and securities positions; and

(C) The identity of its designated agent, if any, acting on its behalf in fulfilling its obligations under paragraphs (b)(4)(ii) and (iii) of this section;

Provided, however, That if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, receipt for purposes of paragraphs (b)(1)(i) and (ii) of this section shall mean receipt by such designated office(s) or department(s);

(2) Where proxies are solicited, the bank shall, within five business days after the record date:

(i) Execute an omnibus proxy, including a power of substitution, in favor of its respondent banks and forward such proxy to the registrant; and

(ii) Furnish a notice to each respondent bank in whose favor an omnibus proxy has been executed that it has executed such a proxy, including a power of substitution, in its favor pursuant to paragraph (b)(2)(i) of this section.

(3) Upon receipt of the proxy, other proxy soliciting material, and/or annual reports to security holders shall forward to each beneficial owner on whose behalf it holds securities, no later than five business days after the date it receives such material and, where a proxy is solicited, the bank shall forward, with the other proxy soliciting material and/or the annual report, either:

(i) A properly executed proxy: (A) indicating the number of securities held for such beneficial owner; (B) bearing the beneficial owner's account number or other form of identification, together with instructions as to the procedures to vote the securities; (C) briefly stating which other proxies, if any, are required to permit se-

curities to be voted under the terms of the instrument creating that voting power or applicable state law; and (D) being accompanied by an envelope addressed to the registrant or its agent, if not provided by the registrant; or

(ii) A request for voting instructions (for which registrant's form of proxy may be used and which shall be voted by the record holder or respondent bank in accordance with instructions received), together with an envelope addressed to the record holder or respondent bank.

(d) The bank shall: (i) respond, by first class mail or other equally prompt means, directly to the registrant no later than one business day after the date it receives an inquiry made in accordance with Rule 14a-13(b)(1) or Rule 14c-7(b)(1) by indicating the name and address of each of its respondent banks that holds the registrant's securities on behalf of beneficial owners, if any;

(ii) Through its agent or directly, provide the registrant, upon the registrant's request and within the time specified in paragraph (b)(4)(iii) of this section, with the names, addresses and securities position, compiled as of a date specified in the registrant's request which is no earlier than five business days after the date the registrant's request is received, of:

(A) With respect to customer accounts opened on or before December 28, 1986, beneficial owners of the registrant's securities on whose behalf it holds securities who have consented affirmatively to disclosure of such information, subject to paragraph (b)(5) of this section; and

(B) With respect to customer accounts opened after December 28, 1986, beneficial owners of the registrant's securities on whose behalf it holds securities who have not objected to disclosure of such information; *Provided, however*, that if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such requests, receipt for pur-

poses of paragraphs (b)(4)(i) and (ii) of this section shall mean receipt by such designated office(s) or department(s); and

(iii) Through its agent or directly, transmit the data specified in paragraph (b)(4)(ii) of this section to the registrant no later than five business days after the date specified by the registrant.

NOTE 1: Where a record holder bank or respondent bank employs a designated agent to act on its behalf in performing the obligations imposed on it by paragraphs (b)(4)(ii) and (iii) of this section, the five business day time period for determining the date as of which the beneficial owner information is to be compiled is calculated from the date the designated agent receives the registrant's request. In complying with the registrant's request for beneficial owner information under paragraphs (b)(4)(ii) and (iii) of this section, a record holder bank or respondent bank need only supply the registrant with the names, addresses and securities positions of affirmatively consenting and non-objecting beneficial owners.

NOTE 2: If a record holder bank or respondent bank receives a registrant's request less than five business days before the requested compilation date, it must provide a list compiled as of a date that is no more than five business days after receipt and transmit the list within five business days after the compilation date.

(5) For customer accounts opened on or before December 28, 1986, unless the bank has made a good faith effort to obtain affirmative consent to disclosure of beneficial owner information pursuant to paragraph (b)(4)(ii) of this section, the bank shall provide such information as to beneficial owners who do not object to disclosure of such information. A good faith effort to obtain affirmative consent to disclosure of beneficial owner information shall include, but shall not be limited to, making an inquiry:

(i) Phrased in neutral language, explaining the purpose of the disclosure and the limitations on the registrant's use thereof;

(ii) Either in at least one mailing separate from other account mailings or in repeated mailings; and

(iii) In a mailing that includes a return card, postage paid enclosure.

(c) *Exceptions to Dissemination and Beneficial Owner Information Requirements.* The bank shall be subject to the following with respect to its dissemination and beneficial owner requirements:

(1) With regard to beneficial owners of exempt employee benefit plan securities, the bank shall not:

(i) Include information in its response pursuant to paragraph (b)(i) of this section; forward proxies (or in lieu thereof requests for voting instructions), proxy soliciting material, or annual reports to security holders pursuant to paragraph (b)(3) of this section to such beneficial owners; or

(ii) Include in its response pursuant to paragraphs (b)(4) and (b)(5) of this section data concerning such beneficial owners.

(2) The bank need not satisfy:

(i) Its obligations under paragraphs (b)(2), (b)(3), and (b)(4) of this section if a registrant does not provide assurance of reimbursement of its reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2), (b)(3), and (b)(4) of this section; or

(ii) Its obligation under paragraph (b)(3) of this section to forward annual reports to consenting and nonobjecting beneficial owners identified pursuant to paragraphs (b)(4)(ii) and (iii) of this section if the registrant notifies the record holder bank or respondent bank,

pursuant to Rule 14a-13(c) or Rule 14c-7(c), that the registrant will mail the annual report to beneficial owners whose names, addresses and securities positions are disclosed pursuant to paragraphs (b)(4)(ii) and (iii) of this section.

(3) For the purposes of determining the fees which may be charged to registrants pursuant to Rule 14a-13 (b)(5), Rule 14c-7(a)(5), and paragraph (c)(2) of this section for performing obligations under paragraphs (b)(2), (b)(3), and (b)(4) of this section, an amount no greater than that permitted to be charged by brokers or dealers for reimbursement of their reasonable expenses, both direct and indirect, incurred in connection with performing the obligations imposed by paragraphs (b)(2) and (b)(3) of Rule 14b-1, shall be deemed to be reasonable.

* * * *

14c-7 Providing copies of material for certain beneficial owners.

(a) If the registrant knows that securities of any class entitled to vote at a meeting, or by written authorizations or consents if no meeting is held, are held of record by a broker, dealer, voting trustee, or bank, association, or other entity that exercises fiduciary powers in nominee name or otherwise, the registrant shall:

(1) By first class mail or other equally prompt means:

(i) Inquire of each such record holder:

(A) Whether other persons are the beneficial owners of such securities and, if so, the number of copies of the information statement necessary to supply such material to such beneficial owners;

(B) In the case of an annual (or special meeting in lieu of the annual) meeting, or written consents in lieu of such meeting, at which directors are to be elected, the

number of copies of the annual report to security holders, necessary to supply such report to such beneficial owners for whom proxy material has not been and is not to be made available and to whom such reports are to be distributed by such record holder or its nominee and not by the registrant;

(C) If the record holder or respondent bank has an obligation under Rule 14b-1(b)(3) or Rule 14b-2(b)(4)(ii) and (iii), whether an agent has been designated to act on its behalf in fulfilling such obligation, and, if so, the name and address of such agent; and

(D) whether it holds the registrant's securities on behalf of any respondent bank and, if so, the name and address of each such respondent bank; and

(ii) Indicate to each such record holder:

(A) Whether the registrant pursuant to paragraph (c) of this section, intends to distribute the annual report to security holders to beneficial owners of its securities whose names, addresses and securities positions are disclosed pursuant to Rules 14b-1(b)(3) and 14b-2(b)(4)(ii) and (iii);

(B) The record date; and

(C) At the option of the registrant, any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(2) Upon receipt of a record holder's or respondent bank's response indicating, pursuant to Rule 14b-2(b)(1)(i), the names and addresses of its respondent banks, within one business day after the date such response is received, make an inquiry of and give notification to each such respondent bank in the same manner required by paragraph (a)(1) of this section; *Provided, however*, the inquiry required by paragraphs (a)(1) and (a)(2) of this section shall not cover beneficial owners of exempt employee benefit plan securities;

(3) Make the inquiry required by paragraph (a)(1) of this section on the earlier of:

(i) At least 20 business days prior to the record date of the meeting of security holders or the record date of written consents in lieu of a meeting; or

(ii) At least 20 business days prior to the date the information statement is required to be sent or given pursuant to Rule 14c-2(b); *Provided, however,* That, if a record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such inquiries, the inquiry shall be made to such designated office(s) or department(s);

(4) Supply, in a timely manner, each record holder and respondent bank of whom the inquiries required by paragraphs (a)(1) and (a)(2) of this section are made with copies of the information statement and/or the annual report to security holders, in such quantities, assembled in such form and at such place(s), as the record holder or respondent bank may reasonably request in order to send such material to each beneficial owner of securities who is to be furnished with such material by the record holder or respondent bank; and

(5) Upon the request of any record holder or respondent bank that is supplied with information statements and/or annual reports to security holders pursuant to paragraph (a)(3) of this section, pay its reasonable expenses for completing the mailing of such material to beneficial owners.

NOTE 1: If the registrant's list of security holders indicates that some of its securities are registered in the name of a clearing agency registered pursuant to section 17A of the Act (*e.g.*, "Cede & Co.," nominee for the Depository Trust Company), the registrant shall make appropriate inquiry of the clearing agency and thereafter of the participants in such a clearing agency who may hold on behalf of a beneficial owner or respondent bank,

and shall comply with the above paragraph with respect to any such participant (*see* Rule 14c-1(h)).

NOTE 2: The requirement for sending an annual report to security holders of record having the same address will be satisfied by sending at least one report to a holder of record at that address provided that those holders of record to whom a report is not sent agree thereto in writing. This procedure is not available to registrants, however, where banks, associations, other entities that exercise fiduciary powers, brokers, dealers and other persons hold securities in nominee accounts or "street names" on behalf of beneficial owners, and such persons are not relieved of any obligation to obtain or send such annual report to the beneficial owners.

NOTE 3: The attention of registrants is called to the fact that each broker, dealer, bank, association, and other entity that exercises fiduciary powers has an obligation pursuant to Rule 14b-1 and Rule 14b-2 (except as provided therein with respect to exempt employee benefit plan securities held in nominee name) and with respect to brokers and dealers, applicable self-regulatory organization requirements to obtain and forward, within the time periods prescribed therein, (a) information statements to beneficial owners on whose behalf it holds securities, and (b) annual reports to security holders to beneficial owners on whose behalf it holds securities, unless the registrant has notified the record holder or respondent bank that it has assumed responsibility to mail such material to beneficial owners whose names, addresses and securities positions are disclosed pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii).

NOTE 4: The attention of registrants is called to the fact that registrants have an obligation, pursuant to paragraph (d) of this section, to cause information statements and annual reports to security holders to be furnished, in accordance with Rule 14c-2, to beneficial owners of exempt employee benefit plan securities.

(b) Any registrant requesting pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii) a list of names, addresses and securities positions of beneficial owners of its securities who either have consented or have not objected to disclosure of such information shall:

(1) By first class mail or other equally prompt means, inquire of each record holder and each respondent bank identified to the registrant pursuant to Rule 14b-2(b)(4)(i) whether such record holder or respondent bank holds the registrant's securities on behalf of any respondent banks and, if so, the name and address of each such respondent bank;

(2) Request such list be compiled as of a date no earlier than five business days after the date the registrant's request is received by the record holder or respondent bank; *Provided, however,* That if the record holder or respondent bank has informed the registrant that a designated office(s) or department(s) is to receive such requests, the request shall be made to such designated office(s) or department(s);

(3) Make such request to the following persons that hold the registrant's securities on behalf of beneficial owners: all brokers, dealers, banks, associations and other entities that exercise fiduciary powers; *Provided, however,* such request shall not cover beneficial owners of exempt employee benefit plan securities as defined in Rule 14a-1(d)(1); and, at the option of the registrant, such request may give notice of any employee benefit plan established by an affiliate of the registrant that holds securities of the registrant that the registrant elects to treat as exempt employee benefit plan securities;

(4) Use the information furnished in response to such request exclusively for purposes of corporate communications; and

(5) Upon the request of any record holder or respondent bank to whom such request is made, pay the reason-

able expenses, both direct and indirect, of providing beneficial owner information.

NOTE: A registrant will be deemed to have satisfied its obligations under paragraph (b) of this section by requesting consenting and non-objecting beneficial owner lists from a designated agent acting on behalf of the record holder or respondent bank and paying to that designated agent the reasonable expenses of providing the beneficial owner information.

(c) A registrant, at its option, may mail its annual report to security holders to the beneficial owners whose identifying information is provided by record holders and respondent banks, pursuant to Rule 14b-1(b)(3) and Rule 14b-2(b)(4)(ii) and (iii), provided that such registrant notifies the record holders and respondent banks at the time it makes the inquiry required by paragraph (a) of this section that the registrant will mail the annual report to security holders to the beneficial owners so identified.

(d) If a registrant furnishes information statements to record holders and respondent banks who hold securities on behalf of beneficial owners, the registrant shall cause information statements and annual reports to security holders to be furnished, in accordance with Rule 14c-2, to beneficial owners of exempt employee benefit plan securities.

B. RULES UNDER SECTION 15(c), SECURITIES EXCHANGE ACT OF 1934

* * * *

15c3-2 Customers' free credit balances.

No broker or dealer shall use any funds arising out of any free credit balance carried for the account of any customer in connection with the operation of the business of such broker or dealer unless such broker or dealer has established adequate procedures pursuant to which each

customer for whom a free credit balance is carried will be given or sent, together with or as a part of the customer's statement of account, whenever sent but not less frequently than once every three months, a written statement informing such customer of the amount due to the customer by such broker or dealer on the date of such statement, and containing a written notice that (a) such funds are not segregated and may be used in the operation of the business of such broker or dealer, and (b) such funds are payable on the demand of the customer: *Provided, however,* That this section shall not apply to a broker or dealer which is also a banking institution supervised and examined by State or Federal authority having supervision over banks. For the purpose of this section the term *customer* shall mean every person other than a broker or dealer.

15c3-3 Customer protection—reserves and custody of securities.

* * * *

(e) *Special reserve bank account for the exclusive benefit of customers.* (1) Every broker or dealer shall maintain with a bank or banks at all times when deposits are required or hereinafter specified a "Special Reserve Bank Account for the Exclusive Benefit of Customers" (hereinafter referred to as the "Reserve Bank Account"), and it shall be separate from any other bank account of the broker or dealer. Such broker or dealer shall at all times maintain in such Reserve Bank Account, through deposits made therein, cash and/or qualified securities in an amount not less than the amount computed in accordance with the formula set forth in Rule 15c3-3a.

(2) It shall be unlawful for any broker or dealer to accept or use any of the amounts under items comprising Total Credits under the formula referred to in paragraph (e)(1) of this section except for the specified purposes indicated under items comprising Total Debits under the

formula, and, to the extent Total Credits exceed Total Debits, at least the net amount thereof shall be maintained in the Reserve Bank Account pursuant to paragraph (e)(1) of this section.

(3) Computations necessary to determine the amount required to be deposited as specified in pargraph (e)(1) of this section shall be made weekly, as of the close of the last business day of the week, and the deposit so computed shall be made no later than 1 hour after the opening of banking business on the second following business day; provided, however, a broker or dealer which has aggregate indebtedness not exceeding 800 percent of net capital (as defined in Rule 15c3-1 or in the capital rules of a national securities exchange of which it is a member and exempt from Rule 15c3-1 by paragraph (b)(2) thereof) and which carries aggregate customer funds (as defined in paragraph (a)(10) of this section), as computed at the last required computation pursuant to this section, not exceeding $1 million, may in the alternative make the computation monthly, as of the close of the last business day of the month, and, in such event, shall deposit not less than 105 percent of the amount so computed no later than 1 hour after the opening of banking business on the second following business day. If a broker or dealer, computing on a monthly basis, has, at the time of any required computation, aggregate indebtedness in excess of 800 percent of net capital, such broker or dealer shall thereafter compute weekly as aforesaid until four successive weekly computations are made, none of which were made at a time when his aggregate indebtedness exceeded 800 percent of his net capital. Computations in addition to the computations required in this paragraph (3), may be made as of the close of any other business day, and the deposits so computed shall be made no later than 1 hour after the opening of banking business on the second following business day. The broker or dealer shall make and maintain a record of each such computation

made pursuant to this paragraph (3) or otherwise and preserve each such record in accordance with Rule 17a-4.

* * * *

15c3-3a Exhibit A—formula for determination of reserve requirement of brokers and dealers under Rule 15c3-3.

	Credits	Debits
1. Free credit balances and other credit balances in customers' security accounts. (See Note A)	$xxx	.....
2. Monies borrowed collateralized by securities carried for the accounts of customers (See Note B.)	xxx	.....
3. Monies payable against customers' securities loaned (See Note C.)	xxx	.....
4. Customers' securities failed to receive (See Note D.)	xxx	.....
5. Credit balances in firm accounts which are attributable to principal sales to customers	xxx	.....
6. Market value of stock dividends, stock splits and similar distributions receivable outstanding over 30 calendar days	xxx	.....
7. Market value of short security count differences over 30 calendar days old	xxx	.....
8. Market value of short securities and credits (not to be offset by longs or by debits) in all suspense accounts over 30 calendar days	xxx	.....
9. Market value of securities which are in transfer in excess of 40 calendar days and have not been confirmed to be in transfer by the transfer agent or the issuer during the 40 days	.....	xxx

	Credits	Debits
10. Debit balances in customers' cash and margin accounts excluding unsecured accounts and accounts doubtful of collection. (See Note E.)	.....	XXX
11. Securities borrowed to effectuate short sales by customers and securities borrowed to make delivery on customers' securities failed to deliver	.....	XXX
12. Failed to deliver of customers' securities not older than 30 calendar days	.....	XXX
13. Margin required and on deposit with the Options Clearing Corp. for all option contracts written or purchased in customer accounts. (See Note F.)	.....	XXX
Total credits	.....	.....
Total debits	.....	.....
14. Excess of total credits (sum of items 1-9) over total debits (sum of items 10-13) required to be on deposit in the "Reserve Bank Account" (Rule 15c3-3(e)). If the computation is made monthly as permitted by this section, the deposit shall be not less than 105 percent of the excess of total credits over total debits	.....	XXX

[Notes omitted]

APPENDIX B

EXHIBIT 1 TO SPECIAL CONSULTANT'S AGREEMENT (UNCLAIMED PROPERTY CLEARINGHOUSE)

The examination of the books and records of the holders of abandoned property and the demand for delivery of reportable property shall be made pursuant to the following procedures:

1. The holdings of the U.S. Supreme Court in *Texas v. New Jersey* (85 S.Ct. 1136) and *Pennsylvania v. New York* (92 S.Ct. 2880) regarding which state has the right to escheat property shall be followed:

(a) Where the name and last known address of the apparent owner according to the books and records of the holder is in Delaware, it shall be deemed to be reportable to Delaware.

(b) If the holder has no records whatsoever setting forth the name and last known address of the apparent owner, the property shall be deemed reportable to the state of incorporation of the holder.

(c) An address shall be deemed to mean a description of location sufficient for delivery and receipt of mail.

(d) Where the address of the apparent owner cannot be readily ascertained but in fact exists in the books and records of the holder, sampling techniques will be used to allocate the property among the states participating in the review. In such event, if required, sampling techniques will also be utilized to ascertain the proportion of the total reportable property for which the holder has no names or names but no last known addresses.

(e) If the State's Unclaimed Property Law provides an express cutoff date setting forth when the obligation of a holder to report commenced, it will be used.

(f) If the Unclaimed Property Law does not set forth a cutoff date, the holding in *Douglas v. Cranston* (58

Cal.2d 462) will be followed and the obligations of the holder will be deemed to require the reporting of all unclaimed property in the possession of the holder on which the statute of limitations had not yet run as of the effective date of the adoption of the State's Unclaimed Property Act. However, in those instances where the State advises Special Consultant that state law permits retroactive extension or abolition of the statute of limitations, the longest period otherwise permitted by law will be used (subject to the availability of the records of the holder).

(g) If the amount of reportable unclaimed property cannot be ascertained from the books and records of the holder, statistical estimation techniques may be used for such periods.

2. Notwithstanding the provisions of paragraph 1 hereof, nothing contained therein shall prevent, waive or otherwise affect the right of the State to claim from any other state property reported and delivered to such state according to the provisions of paragraph 1. Special Consultant shall upon request of State provide State with such information as may have been obtained relevant to such claim.

APPENDIX C

ANN W. RICHARDS
TREASURER

[STATE SEAL]

STATE OF TEXAS

October 16, 1986

Treasury Department
P.O. Box 12608 Capitol Station
Austin, Texas 78711

LBJ State Office Building
Congress at 17th St.
(512) 463-6000

Ms. Peggy Maggiacomo
Legal Assistant
E. F. Hutton & Company, Inc.
One Battery Park Plaza
New York, N.Y. 10004

Re: Unclaimed and Abandoned Property

Dear Ms. Maggiacomo:

On December 12, 1985, you notified the Texas Treasury that certain property had been reported to the State of New York for which the last-known mailing address is in Texas. Nine months later, we have received from New York a group of mostly worthless certificates and a promise of a check to be sent within four to six weeks.

In the course of your letter (a copy of which is enclosed), you provided an explanation for the practice of reporting Texas property to New York. Because the explanation is contrary to the decision of *Texas v. New Jersey*, 379 U. S. 674, a United States Supreme Court case decided in 1965; and because of the ensuing history of the claim that the State of Texas has pursued with the State of New York, formal demand for the correct reporting to Texas of unclaimed securities and dividends listed in your December 12 letter is made.

Let me explain. Your letter noted that E. F. Hutton "maintains its principal place of business in the State of New York" and that the New York statute "asserts jurisdiction over abandoned . . . property which may be in our possession within the State due to the centralized nature of our security operations." Both of these arguments were advanced to the Supreme Court in *Texas vs. New Jersey* and rejected in the Court's final decision. The Court said that for reasons of "ease of administration" and "equity," the rule adopted requires reporting to the state of last-known address of the creditor (or owner) as shown by the debtor's (holder's) books and records; and if there is no last-known address, then to the state of incorporation of the debtor. If the state of last-known address does not have an applicable escheat law, then the Court further provided that the state of incorporation could hold the property until such time as the state of last-known address enacted law covering the property.

This case is universally observed as establishing unclaimed property reporting priorities. It applies to New York, Texas and all other states. At no time has Texas made New York its agent in any way to take custody of Texans' property. Thus, demand is made that all property abandoned by Texas owners for the relevant period be reported to Texas under its laws.

The reasons why this is necessary are demonstrated graphically in the claim we filed with New York *nine* months ago.

- The delay in our receiving the property;
- The fact that there is no accounting for dividends from the time contact with the owner was lost until the stock was sold; and
- The stock was sold, without advertising the owner's name and without the concurrence of the State of Texas.

Please note that a quick review of the list of securities shows at least four accounts in which the value of the stock has increased significantly since it was sold. Such market risks are eliminated if E. F. Hutton reports to Texas according to the dictates of *Texas vs. New Jersey*. In addition, reporting properly eliminates the next inquiries you and I must work through: 1) where are the accounts for Texas owners that pre-date 1982; 2) where are the accrued dividends for the shares which were turned over to New York, and 3) what dormancy periods were applied?

If New York indemnified you upon your payment of unclaimed property to it, I hope you will do what you can to expedite the proper discharge of the indemnity duty. Also, demand is hereby expressly made that for future report years you report and remit directly to the State of Texas all property described by the *Texas vs. New Jersey* scheme.

The states are working assiduously to improve unclaimed property reporting in the stock securities area—directly through the Unclaimed Property Clearinghouse, by offering a reporting software package for PC and tape reporting. Reporting instructions and forms for you to complete to comply with the law are enclosed. Please call me if you have any questions,

Sincerely,

PAULA SMITH
Director
Unclaimed Property Division

PS na
Enclosure

cc: C. T. Corp. System
811 Dallas Avenue
Houston, Texas 77002

cc: President
E. F. Hutton & Company, Inc.
One Battery Park Plaza
New York, N. Y. 10004

Ms. Betty Powell
Director of Services
Office of Unclaimed Funds
Office of State Comptroller
270 Broadway, Room 911
New York, NY 10007

APPENDIX D

STATE CORPORATION LAWS TREATING RECORDHOLDER AS EXCLUSIVE SHAREHOLDER

Ala. Code § 10-2A-2(13) (Supp. 1991) (shareholder means holder of record).

Alaska Stat. § 10.06.990(36) (Supp. 1991) (defines shareholder as the holder of record).

Ariz. Rev. Stat. Ann. § 10-002(16) (Supp. 1991) (same).

Ark. Stat. Ann. § 4-27-140(22) (Michie Supp. 1991) (adopted the 1984 MBCA definition of shareholder).

Cal. Corp. Code § 185 (Supp. 1992) (defines shareholder as the holder of record).

Colo. Rev. Stat. Ann. § 7-1-102(11) (West 1990) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Conn. Gen. Stat. Ann. § 33-334 (West Supp. 1990) (does not define shareholder, but permits only shareholders of record to inspect corporate books and records).

Del. Code Ann. tit. 8, § 220 (Supp. 1991) (same).

D.C. Code Ann. § 29-302(7) (Supp. 1991) (defines shareholder as the holder of record).

Fla. Stat. Ann. § 607.0140(23) (West Supp. 1991) (1984 MBCA definition).

Ga. Code Ann. § 14-2-140(25) (Supp. 1991) (same).

Haw. Rev. Stat. Ann. § 415-2 (Michie 1988) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Idaho Code § 30-1-2(f) (Supp. 1991) (same).

Ill. Ann. Stat. ch. 32, para. 1.80(g) (Smith-Hurd 1985) (defines shareholder as the holder of record).

Ind. Code Ann. § 23-1-20-21 (Burns Supp. 1991) (1984 MBCA definition).

Iowa Code Ann. § 490.140(22) (West Supp. 1991) (same).

Kan. Stat. Ann. § 17-6510 (Supp. 1990) (defines stockholder as the stockholder of record for purposes of inspecting corporate books and records).

Ky. Rev. Stat. Ann. § 271B. 1-400(22) (Michie Supp. 1989) (1984 MBCA definition).

La. Rev. Stat. Ann. § 12:1(R) (West 1969) (defines shareholder as holder of record).

Me. Rev. Stat. Ann. tit. 13A, § 102(17) (West 1981) (same).

Md. Corps. & Ass'ns Code Ann. § 1-101(t) (1985) (defines stockholder as one who holds shares of stock in a corporation).

Mich. Comp. Laws Ann. § 450.1487(2) (West 1990) (does not define shareholder, but permits only shareholders of record to inspect corporate books and records).

Minn. Stat. Ann. § 302A.011(29) (West Supp. 1991) (defines shareholder as "a person registered on the books or records of a corporation or its transfer agent or registrar as the owner of whole . . . shares of the corporation").

Miss. Code Ann. § 79-4-1.40(22) (Supp. 1991) (1984 MBCA definition).

Mo. Ann. Stat. § 351.015(15) (Vernon Supp. 1991) (defines shareholder as the holder of record).

Mont. Code Ann. § 35-1-113(22) (Supp. 1991) (1984 MBCA definition).

Neb. Rev. Stat. § 21-2002(7) (Supp. 1990) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Nev. Rev. Stat. § 78.010(f) (Supp. 1991) (defines "stockholder of record" as "a person whose name appears on the stock ledger of the corporation").

N.H. Rev. Stat. Ann. § 293-A: 1 (XVII) (Supp. 1991) (defines shareholder as the holder of record).

N.J. Stat. Ann. § 14A:1-2.1(1) (West Supp. 1991) (same).

N.M. Stat. Ann. § 53-11-2(F) (Michie Supp. 1991) (same).

N.Y. Bus. Corp. Law § 624 (McKinney Supp. 1992) (does not define shareholder, but permits only shareholders of record to inspect corporate books and records).

N.C. Gen. Stat. § 55-1-40(22) (Supp. 1991) (1984 MBCA definition).

N.D. Cent. Code § 10-19.1-01(27) (Supp. 1991) (defines shareholder as "a person registered on the books or records of a corporation or its transfer agent or registrar as the owner of . . . shares of the corporation").

Ohio Rev. Code Ann. § 1701.01(F) (Anderson Supp. 1991) (defines shareholder as "a person whose name appears on the books of the corporation as the owner of shares of such corporation").

Okla. Stat. Ann. tit. 18, § 1065(a) (West Supp. 1991) (defines shareholder as the shareholder of record for purposes of inspecting corporate books and records).

Or. Rev. Stat. § 60.001(20) (1989) (1984 MBCA definition).

15 Pa. Cons. Stat. Ann. § 1102 (Supp. 1991) (defines shareholder as a "record holder or record owner of shares in a corporation").

R.I. Gen. Laws § 7-1.1-2(6) (Supp. 1991) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a record holder may certify that all or a portion of its shares are held for the account of specified persons).

S.C. Code Ann. § 33-1-400(23) (Law. Co-op. 1990) (1984 MBCA definition).

S.D. Codified Laws Ann. § 47-2-1-(6) (1983) (defines shareholder as the holder of record, but provides that a board of directors may adopt a procedure under which a recordholder may certify that all or a portion of its shares are held for the account of specified persons).

Tenn. Code Ann. § 48-11-201(24) (Supp. 1991) (1984 MBCA definition).

Tex. Bus. Corp. Act Ann. art. 1.02(A)(15) (West Supp. 1991) (defines shareholder as "the person in whose name shares issued by a corporation are registered at the relevant time in the share transfer records maintained by the corporation").

Utah Code Ann. § 16-10-2 (1987) (defines shareholder as the holder of record).

Vt. Stat. Ann. tit. 11, § 1802(6) (Supp. 1991) (same).

Va. Code Ann. § 13.1-603 (Michie Supp. 1991) (1984 MBCA definition).

Wash. Rev. Code Ann. § 23B.01.400(25) (West Supp. 1992) (same).

W. Va. Code § 31-1-6(o) (Supp. 1991) (defines shareholder as "one who is a holder of record of shares in a corporation").

Wis. Stat. Ann. § 180.0103(14) (West Supp. 1989-1990) (1984 MBCA definition).

Wyo. Stat. § 17-16-140(XX) (Supp. 1991) (same).

APPENDIX E

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

STATEMENT OF RICHARD KIGER

RICHARD KIGER hereby states as follows:

1. I am Master in Chancery for the Court of Chancery of the State of Delaware. In connection with the above-captioned action, I have prepared statistics on two areas of the Court of Chancery workload during the calendar years 1989 to 1991; the data were compiled from business records customarily prepared by the Court in the course of its work.

2. First, I compiled statistics concerning the total number of trial days spent by the Court of Chancery on trials involving corporations incorporated in the State of Delaware. A trial for purposes of these calculations is a

proceeding in a courtroom during which live testimony and other evidence is presented and following which the Court must determine (1) the facts of the case; (2) the applicable law; and (3) the relief that should be granted to the parties. This definition does not include courtroom proceedings during which lawyers make arguments as to how the case should be conducted or the law should be applied, and in which no live testimony is offered. Hence, the focus is on a specific kind of courtroom activity—the trial as defined above—rather than all occasions on which a courtroom is used to conduct the Court's business.

3. The following table sets forth the information I compiled regarding Chancery Court trial days for cases involving corporations incorporated in Delaware:

	1989	1990	1991	Total
Total number of trial days	109	94	79	282
Number of trial days involving Delaware corporations	75	62	47	184
Percentage	69%	66%	59%	65%

4. Second, I compiled statistics concerning the number of opinions specifically addressing issues arising under Title 8 of the Delaware Code, the Delaware General Corporation Law. The numbers of such opinions written during the 1989 to 1991 period are as follows:

	1989	1990	1991	Total
Total number of written opinions	163	185	156	504
Total number of corporation law opinions	105	98	87	290
Percentage	64.4%	53.0%	55.8%	57.5%

5. It should be noted, however, that corporate cases tend typically to be more complex. As a result, opinions in these cases tend to be more elaborate and more demand-

ing of the Court's time than the Court's non-corporate opinions. *See, e.g., In re RJR Nabisco, Inc. Shareholders Litig.*, Allen, C. [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,194 at 91,700 (Del. Ch. 1989) (58 pages); *Paramount Communications, Inc.* v. *Time, Inc.*, Allen, C. [1988-89 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,514 at 93,264 (Del. Ch. 1989) (79 pages); *Cede & Co.* v. *Technicolor, Inc.*, C.A. No. 7129, Allen, C. (Oct. 19, 1990) (85 pages); *In re Appraisal of Shell Oil*, C.A. No. 8080, Hartnett, V.C. (Dec. 11, 1990) (90 pages); *Marceau Investments* v. *Sonitrol Holding Co.*, C.A. No. 12065, Jacobs, V.C. (Oct. 2, 1991) (60 pages). Consequently, the above percentages understate the proportion of the Court's time spent on litigation construing the Delaware General Corporation Law.

Dated: May 1992

/s/ Richard Kiger
RICHARD KIGER
Master in Chancery

APPENDIX F

PROPOSED DECREE

DELAWARE, ET AL. v. *NEW YORK*

No. 111 Original

Decided ————————. — Decree entered ————————.

Decree carrying into effect this Court's opinion of ————, —— U.S. —— (199).

DECREE

This cause having come on to be heard on the Report of the Special Master heretofore appointed by the Court, and the exceptions filed thereto, and having been argued by counsel for the several parties, and this Court having considered the record of the proceedings herein and having stated its conclusions in its opinion announced on ————————, —— U.S. ——, and having considered the positions of the respective parties as to the terms of the decree,

IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. All applications for intervention by a State, District, or Territory in this case that were filed prior to the date of this Decree are granted. The motion of Texas for leave to file an Amended Complaint in Intervention is likewise granted.

2. As used in this Decree, the term "Delaware Brokerage Corporation" means a corporation incorporated under the laws of Delaware engaged in the securities brokerage business, and the term "Escheatable Property of Unknowns" means moneys and other intangible property held by a person as a result of distributions (including without limitation dividends, interest, redemption payments and principal payment) made with respect to such person by reason of such person's status as a holder of record of securities (including in the term "record" not only a record maintained by or on behalf of an issuer

of securities but also a record maintained by a depository or other intermediate holder, including records of one depository or other intermediate holder which is shown on the records of another) to which such person asserts no claim of beneficial ownership for his, her, or its own account but as to which such person has no identification of, or last-known address of, the beneficial owner of such property.

3. Judgment is hereby granted in favor of Plaintiff Delaware and Defendant New York and against all of the Intervening Plaintiffs, and the complaints of all of the Intervening Plaintiffs are hereby dismissed with prejudice.

4. Judgment upon its Complaint is hereby granted to Delaware and against New York, for the reasons stated in the opinion of this Court, with respect to the Escheatable Property of Unknowns held, to be held in the future, or previously held (but taken in escheat or custodial taking by New York under purported right of any statute or common law principle of New York), by Delaware Brokerage Corporations. Such judgment in favor of Delaware with respect to such Escheatable Property of Unknowns shall be subject to the right of any other state than Delaware to recover such property from Delaware upon proof that the last-known address of a creditor in respect of a particular portion of such property was within that other state's borders. It shall not, however, constitute such proof to demonstrate (as a matter of probability or otherwise) that such creditor was one of a category of persons or business entities conducting a particular business or standing in a particular relationship to the Delaware Brokerage Corporations; but only proof of the specific identity of a creditor and of his, her or its last-known address, as shown in the books and records of the Delaware Brokerage Corporation, shall suffice.

5. New York shall, within 270 days next following the entry of this Decree, prepare a detailed accounting of the

Escheatable Property of Unknowns held by Delaware Brokerage Corporations and previously taken in escheat or custodial taking at any time by New York under purported right of any statute or common law principle of New York, shall serve the same upon Delaware, and shall therewith pay to Delaware such amounts of money, and deliver to Delaware such other property, as shall be shown upon such accounting, or would have been shown had such accounting been properly prepared; except that in the case of any such money or property which is shown by such acounting not to have been at the time of such accounting abandoned for a period of five years, such money or property shall be paid or delivered only upon the expiration of such five-year period, but then shall be paid forthwith. Such accounting shall be in reasonable detail and shall be made on a year-by-year basis on whatever fiscal year New York customarily employs for the operations of its state government. Delaware and New York may by agreement extend the time for preparing and serving such accounting in whole or in part.

6. From and after the date of this Decree, New York and its officers and agents are enjoined from demanding, collecting or seeking to collect (through the institution of any judicial or administrative proceeding or through formal or informal demand, or in any other manner) from any Delaware Brokerage Corporation any Escheatable Property of Unknowns.

7. Should there be any factual dispute concerning whether property is entitled to be recovered by Delaware from New York under this Decree, or any dispute with respect to paragraph 4 of this Decree or the accounting ordered by paragraph 5 of this Decree, that is not adjusted and settled between the parties to such dispute, either such party may apply at the foot of this Decree for relief from this Court, and this Court may make such order in the premises, including an order of reference, as it shall then deem appropriate.

8. Any relief prayed for by any party to this action inconsistent with the foregoing is denied.

43

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

—v.—

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN RESPONSE TO THE REPORT OF THE SPECIAL MASTER AND BRIEF OF *AMICI CURIAE*

Judith Welcom
Counsel of Record
Karen W. Sexton
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Amici Curiae

SECURITIES INDUSTRY ASSOCIATION
THE NEW YORK CLEARING HOUSE ASSOCIATION
AMERICAN BANKERS ASSOCIATION
THE DEPOSITORY TRUST COMPANY

TABLE OF CONTENTS

PAGE

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN RESPONSE TO THE REPORT OF THE SPECIAL MASTER iii

TABLE OF AUTHORITIES viii

BRIEF OF *AMICI CURIAE*

INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 5

ARGUMENT 6

I. THE SPECIAL MASTER'S REPORT REPRESENTS A COMPLETE BREAK WITH PRIOR PRECEDENTS 6

A. The State Law Context of the Report 6
B. The Existing Jurisdictional Principles of Escheat Law 9
C. The Report's Creation of New Law 12

II. THE COURT SHOULD NOT ADOPT THE REPORT 13

A. The Report's Recommendations Are Administratively Burdensome 13
B. The Report's Recommendations Are Inequitable 20
C. The Report's Recommendations Defeat the Fundamental Purpose of Escheat Laws 22

III. IF THE COURT ADOPTS THE REPORT, IT SHOULD DO SO PROSPECTIVELY, AND FINANCIAL INSTITUTIONS SHOULD NOT BEAR AN ADDITIONAL ADMINISTRATIVE BURDEN 23

A. If The Court Adopts The Report, It Should Do So Prospectively 23
B. Financial Institutions Should Not Bear An Additional Administrative Burden If The Report Is Adopted 26

CONCLUSION 27

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF *AMICI CURIAE* IN RESPONSE TO THE REPORT OF THE SPECIAL MASTER

The Securities Industry Association ("SIA"), The New York Clearing House Association (the "Clearing House"), the American Bankers Association (the "ABA"), and The Depository Trust Company ("DTC") hereby respectfully move, pursuant to Rule 37 of this Court, for leave to file the

annexed brief in response to the Report of the Special Master. The consent to the filing of the brief has been obtained from 37 states[1] and the District of Columbia. The consent of the states of Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, North Carolina, Oregon, South Carolina, Tennessee, Texas, Virginia, and Wisconsin has been requested and refused.

The *Amici Curiae* represent the entire spectrum of financial institutions in the United States.

SIA is the principal trade association of the securities industry, having as its members over 600 securities brokers and dealers. Its members range from internationally based, diversified financial institutions to small brokerage firms having only a handful of employees.

The Clearing House is an association of 12 leading commercial banks in the City of New York.[2] Its members offer asset management, private banking, trust, custody, and other securities processing services to customers; they hold

---

[1] They are: Alabama, Alaska, Arkansas, California, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, and Wyoming.

[2] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

in trust or custody accounts in excess of $5.4 trillion in securities.

The ABA is a national trade association that represents banks of all sizes and types throughout the United States. The assets of its membership represent approximately 90 percent of the banking industry total. Approximately 97 percent of ABA members are community banks with assets of less than $500 million.

DTC is a limited purpose trust company owned by participating broker-dealers, banks, and other financial institutions and is a national clearinghouse for the settlement of transactions in corporate and municipal securities. DTC is the largest securities depository in the world and maintains custody of $5.7 trillion in securities.

Members of *Amici* trade associations and DTC regularly receive dividend and interest distributions as the record owner of securities that are held on behalf of customers and others with whom they do business, including, in the case of DTC, its participants and their customers. As a result of their role as primary participants in the financial services industry in this country, members of *Amici* trade associations and DTC frequently hold funds that are received as dividend and interest payments on securities ("distributions") for which they are the record owner and for which neither the name nor the last known address of a beneficial owner can be determined. Even though only a tiny fraction of distributions go astray, and the individual amounts are relatively small, the number of such unclaimed distributions and the aggregate dollar amounts are enormous. In the past, financial institutions, as holders of unclaimed distributions,, have routinely been obligated to comply with the abandoned property laws of the various states and have incorporated such requirements into their systems for processing distributions on securities.

Amici have a substantial common interest in the resolution of this controversy: if the Special Master's Report is adopted, it will have an immediate, adverse impact upon their future reporting obligations, as well as upon their day-to-day operations in processing distributions on securities. In addition, if the Report were adopted on a retroactive basis, financial institutions could find themselves subjected to a barrage of state audits, claims for unclaimed distributions received in the distant past, and potential claims for interest and penalties for failure to comply with the escheat laws of many states, which laws by their very terms did not in the past and do not now apply to these financial institutions.

In this regard, the Court should be aware that certain financial institutions participated in discovery proceedings in this action relating to the manner in which distributions are processed in the securities industry. That discovery was not directed to the difficulty or cost of compliance with an issuer-based rule for escheat of distributions as proposed in the Report; nor were *Amici* even aware of the proceedings before the Special Master that addressed the issue of retroactivity and the use of the locating principle of principal executive offices.[3] Thus, *Amici*, who represent the group to be most affected by the Report, have never before had the opportunity to address the issues raised by that Report.

---

[3] Availability of the papers filed in that round of briefing was confined to the parties by direction of the Special Master.

WHEREFORE, *Amici* respectfully move this Court that leave be granted to file the annexed brief of *Amici Curiae*.

Dated: May 26, 1992

Respectfully submitted,

/s/ Judith Welcom

Judith Welcom
Counsel of Record
Karen W. Sexton
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Amici Curiae

Securities Industry Association

The New York Clearing House Association

American Bankers Association

The Depository Trust Company

TABLE OF AUTHORITIES

PAGE

Cases:

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971) 23-25

Connecticut v. Massachusetts, 282 U.S. 660 (1931) 13

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 23

Pennsylvania v. New York, 407 U.S. 206 (1972) 10, 26

Texas v. New Jersey, 379 U.S. 674 (1965) . . . . . *passim*

Uniform Commercial Code:

Section 3-802(1)(b) 8

Section 4-A-104 7

Section 4-A-406 7

Section 8-207 6-7

Other Statutes:

N.Y. Aband. Prop. Law Article V (McKinney 1991) 12n

No. 111 Original

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

BRIEF OF *AMICI CURIAE* IN RESPONSE TO THE REPORT OF THE SPECIAL MASTER

The Securities Industry Association ("SIA"), The New York Clearing House Association (the "Clearing House"), the American Bankers Association (the "ABA"), and The Depository Trust Company ("DTC") submit this brief as *Amici Curiae* in response to the Report of the Special Master.

INTEREST OF *AMICI CURIAE*

The *Amici Curiae* represent the entire spectrum of financial institutions in the United States.

SIA is the principal trade association of the securities industry, having as its members over 600 securities brokers and dealers. Its members range from internationally based, diversified financial institutions to small brokerage firms having only a handful of employees.

The Clearing House is an association of 12 leading commercial banks in the City of New York.[1] Its members offer asset management, private banking, trust, custody, and other securities processing services to customers; they hold in trust or custody accounts in excess of $5.4 trillion in securities.

The ABA is a national trade association that represents banks of all sizes and types throughout the United States. The assets of its membership represent approximately 90 percent of the banking industry total. Approximately 97 percent of ABA members are community banks with assets of less than $500 million.

DTC is a limited purpose trust company owned by participating broker-dealers, banks, and other financial institutions and is a national clearinghouse for the settlement of transactions in corporate and municipal securities. DTC is the largest securities depository in the world and maintains custody of $5.7 trillion in securities.

---

[1] The members of the Clearing House are The Bank of New York, The Chase Manhattan Bank, N.A., Citibank, N.A., Chemical Bank, Morgan Guaranty Trust Company of New York, Manufacturers Hanover Trust Company, Bankers Trust Company, Marine Midland Bank, N.A., United States Trust Company of New York, National Westminster Bank USA, European American Bank, and Republic National Bank of New York.

Members of *Amici* trade associations and DTC carry on their books a substantial portion of the estimated one million different issues of securities outstanding in this country,[2] including corporate, municipal, and governmental debt obligations and equity securities. The issuers of these securities make distributions of interest and dividends through their paying agents to DTC, brokerage firms, banks, and other depositories, who are identified on the books of the issuers' transfer agents as record owners of the securities. While the financial institution may be listed as the record owner, the actual (or "beneficial") owner of the security may be someone else, usually a customer or contra party[3] of the financial institution or, in the case of DTC, one of its participants (or one of their customers). Members of *Amici* trade associations and DTC receive a substantial percentage of the total dollar amount of distributions made in this country annually. In 1991, DTC alone processed $267.4 billion of cash dividend and interest payments, based upon its holdings of approximately 75 percent of all outstanding corporate and municipal debt securities and equity securities.

As a result of their role as primary participants in the financial services industry in this country, members of *Amici*

---

[2] *See, e.g.*, Deposition Transcript of John Cirrito of Prudential Securities Incorporated, at 18, 167 (records reflect approximately 300,000 different issues); DTC 1990 Annual Report (records reflect over 800,000 issues).

[3] The phrase "contra party" is used to mean a second financial institution that has, for example, purchased and taken physical delivery of securities from the record owner (or one of its customers). When a contra party fails to reregister the securities before the dividend or interest record date, the payment is sent by the issuer's paying agent to the record owner (who becomes a debtor to the contra party), even though the record owner no longer holds the securities and may be unable to forward the distribution to its creditor.

trade associations and DTC frequently hold funds that are received as dividend and interest payments on securities ("distributions") for which they are the record owner and for which neither the name nor the last known address of a beneficial owner can be determined. Even though only a tiny fraction of distributions go astray -- estimated to be only 0.02 percent (two ten-thousandths) of the entire amount distributed, Report of the Special Master (the "Report") at 10 n.9 -- and the individual amounts are relatively small, the number of such unclaimed distributions and the aggregate dollar amounts are enormous. In the past, financial institutions, as holders of unclaimed distributions, have routinely been obligated to comply with the abandoned property laws of the various states and have incorporated such requirements into their systems for processing distributions on securities.

Banks and brokerage firms have a substantial common interest in the resolution of this controversy: if the Report is adopted, it will have an immediate, adverse impact upon their future reporting obligations, as well as upon their day-to-day operations in processing distributions on securities. In addition, if the Report were adopted on a retroactive basis, financial institutions could find themselves subjected to a barrage of state audits, claims for unclaimed distributions received in the distant past, and potential claims for interest and penalties for failure to comply with the escheat laws of many states, which laws by their very terms did not in the past and do not now apply to these financial institutions.

In this regard, the Court should be aware that certain financial institutions participated in discovery proceedings in this action relating to the manner in which distributions are processed in the securities industry. That discovery was not directed to the difficulty or cost of compliance with an issuer-based rule for escheat of distributions as proposed in the

Report[4]; nor were *Amici* even aware of the proceedings before the Special Master that addressed the issue of retroactivity and the use of the locating principle of principal executive offices.[5] Thus, *Amici*, who represent the group to be most affected by the Report, have never before had the opportunity to address the issues raised by that Report.

SUMMARY OF ARGUMENT

The Report concludes that an issuer of a security should continue to be considered a debtor, even after it has made payment of a distribution to the record owner of a security. This conclusion represents a marked departure from established tenets of commercial law, which recognize that an issuer's debt is discharged upon payment to the record owner, and it ignores the record owner's role as an agent of the beneficial owner, not the issuer. The Report substitutes a new, federal law of escheat for existing, state law principles. (Point I.)

The Court should not adopt the Report because it frustrates the goals of administrative ease and certainty that underlie existing escheat principles. The administrative burden that would result from the adoption of the Report and the uncertainty of any benefit to be gained by its adoption render the proposal inequitable. Moreover, the rules

---

[4] While a representative of one broker-dealer did submit an affidavit at the request of the Alabama group of states in which he opined that compliance with an issuer-based rule would not be difficult (*see* Affidavit of John Happersett, dated January 3, 1991), members of the *Amici* trade associations and DTC disagree. *See* Point II, *infra*. Moreover, that affidavit addressed neither the use of principal executive offices as a locating principle for issuers nor the particular problems of retroactivity.

[5] Availability of the papers filed in that round of briefing was confined to the parties by direction of the Special Master.

proposed in the Report will impede the efforts of claimants, who are attempting to reclaim lost property, to locate it. (Point II.)

If the recommendations of the Report are adopted, they should not be given retroactive effect. Furthermore, financial institutions should only be required to report unknown-owner abandoned property to one state. They should be insulated from audits, claims, and demands for records. (Point III.)

ARGUMENT

POINT I

THE SPECIAL MASTER'S REPORT REPRESENTS A COMPLETE BREAK WITH PRIOR PRECEDENTS.

A. The State Law Context of the Report

The fundamental premise of the Report is that the significant relationship, for escheat law purposes, is the relationship between the issuer of a security and the ultimate beneficial owner of that security. The Report concludes that an issuer of a security should continue to be considered a debtor, even after it has made payment of a distribution to the record owner. This conclusion radically departs from established tenets of commercial law, ignores the realities of securities industry operations, and contradicts standard accounting principles. It does violence to the fundamental assumptions of commercial law that circumscribe and define debtor-creditor relationships for the specific purpose of ensuring certainty and finality, thus threatening to disengage escheat law principles from the other legal principles that govern the participants in the financial community.

For example, it is a longstanding principle of commercial law, codified in many states' corporation laws and recognized by caselaw and UCC Section 8-207 (adopted

in some form by all states), that an issuer may treat the record owner of a security as the person exclusively entitled to the rights of ownership. Thus, an issuer's debt is discharged upon payment of a dividend or interest distribution to the record owner (the creditor). Upon payment, the issuer ceases to be a debtor and it has no continuing obligation to the record owner. Instead, the financial institution that serves as the record owner, as recipient of the distribution, becomes, in turn, the debtor, and is obligated either to its customers, who may be the beneficial owners, or to another financial institution intermediary. The interactions between the issuer and the record owner, on the one hand, and the record owner and its creditor, on the other, constitute two discrete debtor-creditor relationships. If more than one financial institution intermediary is involved, then additional discrete debtor-creditor relationships also arise.[6]

Further evidence of this principle is found in other provisions of the Uniform Commercial Code that would apply in situations involving an issuer's payments of distributions by funds transfer or by check. For example, UCC Section 4-A-104 provides that a funds transfer is completed when the beneficiary's bank accepts a payment order for the benefit of the beneficiary. As a general rule, the originator is discharged on any underlying obligation to the beneficiary at the time of acceptance pursuant to Section 4-A-406. Thus, when an issuer makes a payment of dividends or interest by funds transfer, the issuer would be the originator, the record owner would be the beneficiary, and the issuer would generally be discharged when the payment was accepted by the record owner's bank. Of

---

[6] For example, DTC, as debtor, will make a payment to one of its financial institution participants, as record owner on DTC's books. That financial institution, as debtor, will make a payment to its customer, as record owner on the financial institution's books.

course, the ultimate beneficial owner *of the security* would not be the "beneficiary" for purposes of Article 4-A, unless he or she were also the record owner. Similarly, in the case of a distribution made by check to the record owner of the security or its agent, the issuer would be discharged on its underlying obligation upon presentment and payment of the check in accordance with Section 3-802(1)(b) of the UCC, irrespective of whether payment were ever received by the ultimate beneficial owner of the security.

These sections adopt, for various types of money transfers, the same principle that underlies the myriad transactions between participants in the securities industry: that payment to the creditor of record releases any obligation on the part of the payor, terminating its status as a debtor. This principle ensures that the rights and obligations associated with money transfers will be definite and clear. If, once a payment is made, the underlying obligation is discharged, the payor cannot be subject to duplicative liability, while the creditor knows against whom to assert a claim. The Report's recharacterization of the issuer of a security as a debtor after payment has been made to a record owner fabricates a debtor-creditor relationship between an issuer and beneficial owner that contradicts years of commercial law and violates the principles of certainty and finality. Moreover, any superficial appeal of this approach -- to the extent that it assumes that distributions go astray in the transaction between the issuer and the record owner -- evaporates in light of the many unclaimed distributions that arise in the subsequent interactions between financial institution intermediaries.

The universal recognition of the record owner as the debtor (after receipt of payment) is essential for orderly distributions of payments on securities. The Report seemingly concludes that for escheat law purposes, the transcendental relationship between an issuer and a potential

beneficial owner should take precedence over the state law objectives of certainty and finality upon which the UCC and similar laws are based. Escheatable items are only the unintended consequence of a series of transfers of money or securities that are governed by state law. Consequently, the imposition, under the guise of federal common law, of a conflicting and ambiguous rule based upon the indirect issuer/beneficial owner relationship threatens the coherence of the distribution process.

B. The Existing Jurisdictional Principles of Escheat Law

This Court, in *Texas v. New Jersey*, 379 U.S. 674 (1965), stated that the question of which state is entitled to escheat unclaimed intangible property "should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." *Id.* at 678. The Court went on to establish such rules -- rules that have been construed and relied on by financial institutions for over 25 years. The Court's rules established jurisdictional principles that instructed debtors where property was located for purposes of determining which state's escheat law to apply, not substantive requirements as to when and where to escheat the property.

In *Texas v. New Jersey*, the Court first held that "each item of property in question in this case is subject to escheat only by the state of the last known address of the creditor, as shown by the debtor's books and records." *Id.* at 681-82 (the "Primary Rule"). This rule was designed for clarity, fairness, and ease of administration. With respect to property owed to persons for whom there was no record of a last address, the Court concluded that the state of incorporation of the holder of the property (the debtor) has the power to escheat the property, subject to the right of another state to prove that the last known address of the creditor was in such state. *Id.* at 682 (the "Backup Rule").

In *Pennsylvania v. New York*, 407 U.S. 206 (1972), the Court adhered to the Backup Rule to ensure "ease of administration":

> [T]o vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided -- that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

Id. at 215 (quoting *Texas v. New Jersey*, 379 U.S. at 679).

These jurisdictional rules relating to the situs of intangibles operate in conjunction with state abandoned property statutes, which adopt specific procedures for determining when property is considered abandoned and what should be done with it. The actual statutory provisions vary significantly from state to state. Indeed, many statutes have differing definitions of abandoned property and differing periods of dormancy, as well as differing reporting requirements, penalty provisions, and indemnification provisions. Despite these differences, however, state abandoned property statutes have consistently recognized that, with respect to securities, the record owners -- and not the issuers -- are the debtors under *Texas v. New Jersey*.

In this regard, one of the Report's central inferences in its deconstruction of *Texas v. New Jersey* is completely unfounded. The Report notes repeatedly that in *Texas v. New Jersey*, the Court did not mention the paying agent and transfer agent intermediaries of Sun Oil, who were the holders of some of the funds that were the subject of the litigation. *See* Report at 18 & n.15, 28, 32-34, 37. The Report infers from this that the Court considered such intermediaries insignificant and intended the term "debtor" to

refer to the originator of the funds rather than to any subsequent holder. This analysis assumes an analogy between the paying agent intermediaries in that case and the financial institution intermediaries that are the subject of the Report. In *Texas v. New Jersey*, the intermediaries were actually agents of the originator of the funds (the issuer), while here the financial institutions are agents of the beneficial owners. This distinction reflects long-established securities industry practice that should not be disturbed. The analogy is therefore flawed, and the point detracts from, rather than supports, the Report's conclusions.

Another example of the manner in which the Report introduces uncertainty into escheat law compliance by over-emphasizing the relationship between the issuer and the beneficial owner is in its treatment of the Primary Rule, which requires escheat to the state of the creditor's last known address. In note 55, the Report questions whether "it is appropriate to look to the next [financial institution] intermediary for purposes of the primary rule." Report at 63 n.55. Later, that implication is elaborated upon: "[I]n applying the primary rule, the last-known-addresses of the beneficial owners, not other intermediaries, will control." Report at 67. Thus, the Report seemingly recommends that the Primary Rule's "last known address" principle not be followed in situations where the apparent owner, based on the records of the holder, is a financial institution intermediary. This interpretive nuance again disrupts the automaticity of the escheat process.

Existing escheat laws and this Court's precedents have uniformly been understood to require a financial institution that holds abandoned property in its capacity as record owner to escheat such property to the state of the last known address of the creditor (whether an individual or a financial institution), as shown by the books and records of the financial institution. When such address cannot be

determined, the financial institution is to escheat the property to the state of the financial institution's incorporation. Brokerage firms, banks, and depositories have generally abided by these rules as commonly interpreted.[7]

C. The Report's Creation of New Law

The Report painstakingly deconstructs prior precedents to justify its claim to be merely a refinement of previous articulations of escheat principles. As discussed above, *Amici* believe that the Report radically changes existing law. Assuming that a new, different Backup Rule should be considered, principles of *stare decisis* to the contrary notwithstanding, the Report's recommendations should be rejected in any event.

In the 27 years since *Texas v. New Jersey*, many states have altered their abandoned property statutes in order to conform them to the rules announced in that decision. Those state statutes have not been drafted to require abandoned property to escheat to the state of the issuer of the security to which an unclaimed distribution relates.[8] Whereas the rules established in *Texas v. New Jersey* act as a jurisdictional

---

[7] This lawsuit was originally precipitated by a dispute between New York and Delaware over New York's alleged non-compliance with the Backup Rule, an allegation that New York sought to rebut under the Primary Rule by claiming the existence of last known addresses in New York for the owners of the distributions held by broker-dealers incorporated in Delaware. While compliance questions and political concerns have affected the evolution of that controversy, there has never, in the history of New York's and Delaware's dealings with financial institutions, been any question as to the identity of the debtor.

[8] Except, of course, when the financial institution holder is acting as an agent of the *issuer*, *see, e.g.*, N.Y. Aband. Prop. Law Article V (McKinney 1991), or, very recently, in response to the pendency of this litigation.

directory, pointing holders of abandoned property to the correct state's abandoned property law, the Report seemingly establishes new, substantive escheat law that is completely independent of state law. It does this in two ways: first, by disengaging the definitions of "debtor" and "creditor" from their commonly understood meanings, and second, by formulating and imposing escheat law obligations that do not derive from any particular state statute. While the bias against judicial promulgation of federal common law may be less pronounced in actions between states, *see, e.g., Connecticut v. Massachusetts*, 282 U.S. 660, 669-71 (1931), there are important differences between this action and other inter-state disputes, because the primary purpose of the laws involved here is to govern the day-to-day obligations and conduct of private parties. If the Report is adopted, the uncertainty caused by its recommendations will inevitably generate unnecessary costs that can be avoided if this Court reaffirms the validity of the existing jurisdictional, rather than substantive, escheat principles.

POINT II

THE COURT SHOULD NOT ADOPT THE REPORT.

A. The Report's Recommendations Are Administratively Burdensome.

The Court formulated the Backup Rule, designating the debtor's state of incorporation as the jurisdiction entitled to escheat the intangible property of creditors with unknown addresses, primarily because it was conducive to ease of administration. *Texas v. New Jersey*, 379 U.S. at 682. The starting point of an analysis of the Report's recommended Backup Rule must therefore be the degree of difficulty in implementing it. *Amici* submit that changing the Backup Rule to require escheat to the state of location (however determined) of the issuer, rather than to the state of

incorporation of the holder, will demand a substantial and unnecessary commitment of time and money on the part of the recipients of unclaimed distributions. As a result, the distribution of securities-related payments will become less efficient and more costly.

In the past, many financial institutions needed only to be familiar with the abandoned property statutes of their state of incorporation and a handful of other states, where property having a last known address might escheat under the Primary Rule. Certain parties to this proceeding have argued that brokerage firms have routinely reported abandoned property to all of the claiming states and, therefore, the burden of compliance with the Report's recommendations would be insignificant. This contention is misplaced on several grounds.

First, while large brokerage firms having clients throughout the country report abandoned customer accounts (pursuant to the Primary Rule) to the states of the customers' last known address, because the account records for the lost customers contain an address, it is relatively easy to determine which state's law to examine and little interpretive effort is necessary.[9] Regional and small brokerage firms are in an entirely different position from the large wire house firms that have a national customer base; such firms have, in many instances, been able to confine their abandoned property compliance to a few contiguous states where they have customers. The level of increased burden on the smaller firms cannot be ignored -- SIA has over 600 members, of which only a dozen or so are household names throughout the country having customers in most of the 50 states. Similarly, banking institutions of all sizes, whose

---

[9] *Amici* disagree with the Report's suggestion, at 39 n.36, that it is easier to report unclaimed distributions to all 50 states than to report abandoned customer accounts to all 50 states.

customers may be more limited geographically for legal reasons, have routinely filed reports under the Primary Rule (for abandoned customer accounts) with only one state or a few in the past.

Second, the Backup Rule has required only that financial institutions turn over the contents of a suspense account annually to a single state without the need to analyze the thousands of items in that account. The Report would drastically change these practices, requiring even a small brokerage firm with a regional clientele or a banking institution to analyze the myriad small items contained in suspense accounts and to file reports on distributions with states where they have had no prior contact -- even in states where the courts would lack personal jurisdiction to enforce a claim against such a financial institution! While it is true that the contents of the suspense accounts are, for most financial institutions, stored in a computer database that is subject to examination and processing, that fact does not minimize the difficulty of escheating distributions to their state of "origination".

State of origination (whether the state of the issuer's corporate domicile *or* its principal executive offices) has never been a datum that has been recorded for the contents of these suspense accounts. Even if the firm has a different database (some firms have dozens or hundreds of different databases) that contains such information, that information would need to be accessed for each issuer represented in the suspense account,[10] subject to subsequent interpretive efforts

---

[10] The Report seemingly assumes that each issue of securities is the subject of a separate suspense account. *Amici* question whether this is in fact the practice among financial institutions. Even if it could be the practice, it would result in an enormous proliferation of suspense accounts (leading to further potential errors) and would not eliminate the interpretive ambiguities of the Report.

if, for example, the particular issuer changed its location between the distribution date and the date the analysis is performed. In short, *Amici* disagree with the Report's conclusion that "[n]o substantial additional bookkeeping or computer activity would be required . . . ." Report at 39.

The reporting process contemplated by the Report would no longer be routine and mechanistic; instead, it would require monitoring by non-clerical personnel. Many states have different dormancy periods for unclaimed property and different deadlines throughout the calendar year when reports must be filed. It is therefore conceivable that each financial institution would be continuously reporting unclaimed property throughout the year. Furthermore, the format of unclaimed property reports and the information required by each format varies from state to state, creating even more complexity within each firm's reporting system. Moreover, financial institutions would be subject to audit by each of the claiming states, resulting in potentially conflicting claims, as well as the need to resolve the individual statutes' substantive conflicts with the Report that arise from the statutes' general recognition of the record owner or holder of the property as the debtor.

The Report's recommendation that the location of issuers (and holders) be determined based upon the location of their principal executive offices is equally unwieldy. Financial institutions do not maintain suspense account records that identify the location of issuers' principal executive offices. Therefore, they would need to substantially modify their recordkeeping systems if the Report is adopted. The new records would have to be maintained based upon the states of principal executive offices of the issuers of hundreds of thousands of issues, and such data would have to be linked to distributions on those issues. Assuming such a system could feasibly be created, it would be extremely expensive and difficult to implement. As corporate issuers change the

location of their principal executive offices, financial institutions would have to constantly update their data.

Financial institutions would also be forced to make *ad hoc* interpretations with respect to issuers that list more than one principal executive office or, for that matter, issuers whose principal executive offices change location between the date a distribution is received and the date it is deemed abandoned. While none of these problems may ultimately be insurmountable, each requires the intervention of a person to decide how to characterize the distribution in question and where to escheat it. This required human intervention may arguably be required at several stages in the life of each unclaimed distribution: when it is first identified, perhaps again later when it is about to be reported and escheated, or maybe again if the categorization (i.e., the location of the issuer) has changed in the interim.

The Report suggests by way of solution that it should not be difficult to obtain the location of the issuer's principal executive offices from filings with the Securities and Exchange Commission (the "SEC") or to implement a computer program identifying issuers and their principal executive offices.[11] These suggestions oversimplify an uncertain and complicated process. There are private database services that contain corporations' designations in SEC filings of their principal executive offices, but those

---

[11] The Report also suggests that it would be relatively simple for financial institutions to identify and locate the issuer of each security by its CUSIP number. Although CUSIP numbers are sometimes used in reporting abandoned property, items are also reported without a CUSIP number or any other descriptive information -- indeed, not all securities have CUSIP numbers. Furthermore, CUSIP numbers do not contain any information regarding the principal executive offices of the issuer. Some firms do not even use CUSIP numbers for recordkeeping, preferring to use an internally assigned, proprietary number.

databases have reported conflicting information and also reveal that hundreds of companies change the location of their principal executive offices. *See* Affidavit of Jeffrey Bossert Clark submitted in support of the State of Delaware's Opening Brief on the Issues of Changing the Supreme Court's Backup Rule and the Retroactive Application of the Backup Rule. Moreover, many companies do not make SEC filings. While the principal executive offices of those companies may be obtainable from other standard databases, a comparison of such databases reveals that many companies list two or more states as the location of their principal executive offices. *See id.* The determination of the location of an issuer's principal executive offices is anything but certain. Whether, for any particular issuer, it is possible to come up with a location is not the point; the necessity of scrutinizing, researching, and interpreting the research for each of the items in the suspense accounts is the problem.

Thus, the concerns raised by the Report's recommendations are interpretive as well as ministerial: it is not simply a question of spending the (not insignificant) time and money to create (and constantly update) or acquire access to computer programs that will identify, for each of an estimated one million issues, the location of the issuers' principal executive offices. A simplified example of the life-cycle of a dividend payment destined for a client of a brokerage firm may illuminate the problem:

- Issuer declares dividend on common stock; its transfer agent prepares to pay all record owners of the common stock.
- Issuer's paying agent issues checks to all record owners (on payment date).
- Brokerage firm credits customers' accounts on payment date and sets up receivables to reflect expected payment from issuer.

- Brokerage firm receives check, which is, for one of a variety of reasons,[12] larger than the receivables previously established; excess funds are recorded in dividend suspense account.

- Unallocated dividend remains in brokerage firm suspense account along with thousands of other items (relating to different issues of securities) that were received during the same period until either (a) a claim for it is asserted, (b) it is applied to an appropriate receivable that has been identified after the initial allocation, or (c) the time for escheat has elapsed.

Existing Rule: When the period of dormancy of the escheat law of the brokerage firm's state of incorporation has elapsed, the remaining contents of the entire suspense account, which may or may not have CUSIP numbers attached to the entries, are printed out on a list and turned over to a single state.

Proposed Rule: At some date prior to when any state's period of dormancy has run, the dividend is analyzed and compared with an in-house or outside vendor's database to determine the issuers' state of principal executive offices. That situs is checked to determine if it has changed since the distribution was received. If so, a decision is made as to which of the two locations should be used. That state's period of dormancy is checked. That state may not have a provision relating to escheat of dividends on securities of issuers whose principal executive offices are in that state, raising a question as to which period of dormancy to use or, indeed, whether that item should be escheated to the *holder's* state of principal executive offices under the Report's

---

12 For a more extensive explanation of how these distributions are made, *see* Report Appendix B, at B-15 through B-19.

Secondary Backup Rule. If the decision is made to use the law of the state of the issuer's principal executive offices, and if that period of dormancy has not elapsed, the dividend is left in account for further analysis. When another review is made, again a situs is determined, checked to see if it is consistent with prior determinations, and, ultimately, the dividend is reported and turned over to some jurisdiction. This process is undertaken for each of the other line items in the suspense account -- numbering perhaps in the thousands or tens of thousands for each firm.

B. The Report's Recommendations Are Inequitable.

The Report accords great significance to the concept of fairness -- using fairness as the "tie-breaker", Report at 35 -- in its creation of new escheat law, but fails to recognize some of the considerations that bear upon fairness. To the extent that fairness is a consideration, it should be considered with respect to the holders of the property as well as in relation to the claiming states. Brokerage firms, banks, and depositories have made a substantial commitment in compliance procedures and computer systems to ensure that beneficial owners are paid the distributions to which they are entitled. The distribution system -- comprising legal, accounting, and technological components -- is highly effective, in part because financial institutions generally credit their customers' accounts with distributions on the payment date, whether or not the financial institution has received payment of the distribution from the issuer. *See* Report at 62-63 & n.54.[13] As the Special Master recognized in his Report, "In a tribute to the efficiency of the distribution system, such payments indeed make their way through the system . . . without

---

[13] Thus, as explicated in the discovery proceedings before the Master, the unclaimed distributions held by financial institutions are generally not attributable to the fact that a customer of that financial institution has not been paid its distribution. *See id.*

incident in the overwhelming percentage of instances." Report at 10.

The existence of unclaimed distributions is an unintended by-product of securities processing -- an irritant to the holders who attempt to develop error-free systems for processing distributions. The administrative burden of retooling the existing systems and adopting new compliance procedures that would be imposed upon financial institutions if the Report were adopted would be substantial. To the extent that financial institutions have no claim to the property that is subject to escheat, it is unfair to impose upon them such an increased level of effort and expense.[14]

The adoption of the issuer's principal executive offices as the new locating principle would compound the inequities in the Report's recommendations. While the Report characterizes this change as "minor", Report at 49, 56, it will in fact be outcome-determinative in most instances. The Report suggests that this change will reward the jurisdiction that created the benefit to the issuer of the security. Report at 35. *Amici* disagree for two reasons. First, the notion that benefits are created where the issuer is located is questionable. Second, a corporation's principal executive office is not necessarily its principal place of business, nor where its actual decisionmaking occurs. Rather, a corporation's choice of where to locate its principal executive offices may depend instead upon legal issues, prestige, income tax benefits, or the lifestyle preferences of top

---

[14] Certain property that may be escheated actually belongs to the financial institution, which cannot prove its entitlement because it is economically infeasible to locate the necessary records. In such situations, the requirement that such holders escheat such property to many states rather than to one decreases the likelihood that some equitable agreement can be reached based upon the holder's good faith demonstration (using statistical sampling or some other means) that some percentage of the property is its own.

management. Thus, given the geometric increase in the burden of escheat law compliance occasioned by adoption of such a nebulous and uncertain rule, the illusoriness of the benefit to be obtained renders the proposal inappropriate and unfair.

C. The Report's Recommendations Defeat the Fundamental Purpose of Escheat Laws.

It is a basic tenet of escheat law that unclaimed property should be placed where the owner can find it. Adoption of the Report, however, could result in the dispersal of a claimant's property around the country. Claimants whose property failed to qualify for escheat under the Primary Rule, because of the absence of a last known address on the holder's records, would therefore be left with the formidable task of determining where and how to assert their claims, and of doing so in multiple states, depending upon the number of different issuers involved. In contrast, under present escheat law, a claimant is able to retrieve all property from one state -- either the state of his or her last known address or the state of incorporation of the holder, i.e., the financial institution with whom he or she dealt. Adoption of the Report would frustrate claimants' efforts to obtain possession of their property and would therefore obstruct the fundamental purpose of escheat law.

Even more important, perhaps, is the manner in which the Report modifies the Primary Rule. Financial institutions may be required, in situations where they actually have a record of the identity of the owner of an unclaimed distribution, to decide whether such owner is a "beneficial owner" (requiring escheat under the Primary Rule) or an "intermediary" (requiring escheat under the Backup Rule) -- thus introducing a judgment call into what was formerly a mechanical exercise. This recharacterization of the Primary Rule may also require a potential claimant to intuit whether some financial institution intermediary may have

characterized the claimant as an intermediary or a beneficial owner before determining where to assert a claim for its property.

POINT III

IF THE COURT ADOPTS THE REPORT, IT SHOULD DO SO PROSPECTIVELY, AND FINANCIAL INSTITUTIONS SHOULD NOT BEAR AN ADDITIONAL ADMINISTRATIVE BURDEN.

A. If The Court Adopts The Report, It Should Do So Prospectively.

Chevron Oil Co. v. Huson, 404 U.S. 97 (1971), adopted the standard for determining whether a decision will apply retroactively or prospectively. Whatever the ultimate effect upon the decision in *Chevron* of this Court's retroactivity opinions in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), *Amici* submit that where, as here, the Court's role is to promulgate federal common law rules, as a matter of equity the *Chevron* analysis should inform the articulation of those rules and the manner in which they will bind the affected parties and non-parties.

In *Chevron*, the Supreme Court formulated the following analysis:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose

> and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-107 (citations omitted). As applied to this case, the *Chevron* analysis supports the nonretroactive application of any decision adopting the Report's recommendations.

Under the first prong of the *Chevron* analysis, the Report creates a new substantive law component to existing escheat jurisprudence. The jurisdictional rules of priority established in *Texas v. New Jersey* were founded upon commercial law concepts based upon state law relationships. The Report defines the debtor and creditor as a matter of federal law by some notion of fairness. The Report ignores the fact that in *Texas v. New Jersey*, 369 U.S. at 680, the Court did not equate fairness with rewarding jurisdictions of companies whose business activities arguably caused the intangible property to come into existence.

Moreover, the Report's proposed changes in escheat law do not predictably arise from prior precedent. The Report changes the fundamental assumption of escheat law principles by changing the universally accepted commercial law understanding of the term "debtor". While the Report examines the particular facts of prior precedents, and concludes that the ultimate outcome of those cases and the Report's recommendations in this one are consistent, this conclusion is rebutted by the prior interpretations of those

precedents by both states and private parties. Additionally, the Report's recommendation that the state of principal executive offices, rather than the state of incorporation, be used as the location of the issuer is self-evidently a complete change in existing escheat law and one that, given its rejection in prior precedents, could not have been foreseen.

Under the second prong of *Chevron*, the Court must determine whether the purpose of the law at issue mandates retroactive, rather than prospective, operation. In *Texas v. New Jersey*, the Court defined its goals in fashioning escheat principles as fairness and ease of administration. A retroactive application of a decision adopting the Report would further neither of these goals. *Amici* submit that it is indisputable that retroactive application of the Report would cause immense administrative burdens for financial institutions, who would necessarily be subjected, by the claiming states, to the arduous task of recreating old records. Each of the millions of items of unclaimed distributions would have to be traced to its original issuer, the location of whose principal executive office (either at the time the distribution became abandoned or, perhaps, at the time the distribution was paid) would have to be unearthed from old and incomplete records. No legal principle would be vindicated by forcing these consequences to ensue; nor is it a sufficient response to suggest that the burden is eliminated if the records do not exist, the question being the level of search for those records that is demanded by the claiming states.

Finally, the *Chevron* test requires consideration of the reliance interests of all affected by changes in the law. Financial institutions have relied upon the commonly accepted statement of the *Texas v. New Jersey* debtor-creditor rule and have built procedures for compliance therewith into their systems for processing securities distributions. If this Court adopts the Report's recommendations, no party will be

harmed by its nonretroactive application: both the states and financial institutions have interpreted the Court's precedents in the same way and have relied upon that interpretation in, respectively, their adoption of escheat laws and their compliance therewith. By contrast, retroactivity would greatly burden financial institutions, as they would be subjected to audits, demands for old records, and potential claims for interest and penalties from all of the claiming states. This process would require an extraordinary expenditure of resources and staffing, with no accompanying benefit.

B. Financial Institutions Should Not Bear An Additional Administrative Burden If The Report Is Adopted.

Adoption of the Report as it stands would require financial institutions to report and escheat property to all of the competing states. Given that each state has a different abandoned property statute, financial institutions would have to familiarize themselves with the conflicting abandoned property laws and would have to comply with differing dormancy periods, filing deadlines, and procedures and formats for filing, as well as hosting auditors from the competing states. *Amici* submit that if this Court adopts the Report, whether prospectively or retroactively, financial institutions should only have to report unclaimed distributions where the addresses are unknown to one designated state.

In *Pennsylvania v. New York*, 407 U.S. 206, 215, the Court stated that states, not financial institutions, should bear the extra costs imposed by escheat rules: "We think that as a matter of fairness the claimant States, and not Western Union, should bear the cost of finding and recording the available addresses, and we shall remand to the Special Master for a hearing and recommendation as to the appropriate formula for distributing those costs." *Id.; see also* Report at 68. Here, an equitable solution to the problems of implementing the Report would allow financial

institutions to report unclaimed distributions to only one designated state (such as their state of incorporation), and require the states themselves to resolve their respective rights to the reported property thereafter. Certainly, each state has a greater interest in developing a complete list of issuers located (by whatever principle) within its borders than does any holder of unclaimed property.[15]

Moreover, if this Court adopts the Report, financial institutions should be insulated from audits and claims for records with respect to stale escheat claims. For years, financial institutions have relied on the common interpretation of the *Texas v. New Jersey* rule. It would therefore be inequitable for them now to be subjected to the immense task of tracing records for all securities distributions in the past years, for which all states would inevitably make demand. Having failed, until the institution of this lawsuit, to press escheat claims based upon the location of issuers of securities, the claiming states should not now be allowed to vindicate such stale claims at the expense of the holders.

CONCLUSION

This Court should not adopt the Special Master's Report. The Report represents a complete break with precedent and its implementation would be administratively burdensome and inequitable, contrary to the established purposes of escheat law. If, however, the Court does adopt the Report, it should do so prospectively only, and in a manner that will put any

---

[15] It has been suggested that holders of unclaimed property avail themselves of the services of one of the abandoned property clearinghouses that have sprung up over the last several years. Given the abundance of interpretive issues raised by the Report's recommendations, it is not clear that such a move would truly protect a holder from an audit or claim by a non-participating state. Moreover, *Amici* foresee that the clearinghouses would have to pass along the cost of complying with the new rules.

resulting burden on the states rather than on financial institutions such as those represented by the *Amici*.

Dated: May 26, 1992

Respectfully submitted,

Judith Welcom
Counsel of Record
Karen W. Sexton
BROWN & WOOD
One World Trade Center
New York, New York 10048
(212) 839-5300

Attorneys for Amici Curiae

Of Counsel:

William J. Fitzpatrick, Esq.
Douglas G. Preston, Esq.
SECURITIES INDUSTRY ASSOCIATION

Norman R. Nelson, Esq.
THE NEW YORK CLEARING HOUSE ASSOCIATION

John J. Gill, III, Esq.
AMERICAN BANKERS ASSOCIATION

Karen G. Lind, Esq.
THE DEPOSITORY TRUST COMPANY

Supreme Court, U.S.
FILED
MAY 26 1992
OFFICE OF THE CLERK

No. 111 Original

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE AND BRIEF AMICI CURIAE OF MIDWEST SECURITIES TRUST COMPANY AND PHILADELPHIA DEPOSITORY TRUST COMPANY IN SUPPORT OF NEITHER PARTY

MICHAEL FISCHER *
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
(414) 289-3749

GEORGE T. SIMON
FOLEY & LARDNER
70 West Madison Street
Chicago, IL 60602-4208
(312) 444-9500

ILENE KNABLE GOTTS
FOLEY & LARDNER
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4680
(202) 862-5300

Attorneys for Amici Curiae Midwest Securities Trust Company and Philadelphia Depository Trust Company

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF MIDWEST SECURITIES TRUST COMPANY AND PHILADELPHIA DEPOSITORY TRUST COMPANY FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

Midwest Securities Trust Company ("MSTC") and Philadelphia Depository Trust Company ("PDTC"), through their counsel, Foley & Lardner, request leave of this Court to file a brief as *amici curiae*. MSTC and PDTC are specifically mentioned in that section of the Report of the Special Master which deals with securities depositories. Report at B-7. They wish to take exception to certain facts reported by the Special Master insofar as they may be viewed as applying to them.

Counsel has obtained the consent of counsel for the principal parties in this case—the States of Delaware and New York—as well as the consent of Bernard Nash,

counsel for approximately 30 of the intervening states. Given the number of other actual and potential parties, counsel has not obtained additional consents. Accordingly, MSTC and PDTC respectfully request that this Court grant their motion for leave to file this brief as *amici curiae*.

Respectfully submitted,

MICHAEL FISCHER *
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
(414) 289-3749

GEORGE T. SIMON
FOLEY & LARDNER
70 West Madison Street
Chicago, IL 60602-4208
(312) 444-9500

ILENE KNABLE GOTTS
FOLEY & LARDNER
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4680
(202) 862-5300

Attorneys for Amici Curiae Midwest Securities Trust Company and Philadelphia Depository Trust Company

* Counsel of Record

Dated this 26th day of May, 1992.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF MIDWEST SECURITIES TRUST COMPANY AND PHILADELPHIA DEPOSITORY TRUST COMPANY AS AMICI CURIAE

MSTC and PDTC are two of three securities depositories in the United States. The other is Depository Trust Company ("DTC"). DTC, based in New York City, is by far the largest of the three.

In his Report, the Special Master explains that the parties have engaged in substantial discovery concerning the operations of DTC. This discovery apparently included the production of documents, a narrative statement, and one or more depositions. See Report at 6. There was no discovery relating to the operations of MSTC or PDTC.

The Report of Special Master sets forth an extensive recitation of facts relating to "securities depositories,"

apparently derived from the information obtained from DTC. See Appendix B, Section C. These facts, which the Special Master claims are not reasonably subject to dispute, relate only to the operations of DTC. Although the operations of MSTC and PDTC are similar to those of DTC in many respects, there are also important differences. One of these differences relates to the manner in which they treat securities, interest, dividends, and other distributions which cannot be accounted for.

In his report, Special Master Jackson sets forth a series of "metafacts", which he describes as general propositions that are generally beyond dispute. According to the Special Master, it is a "metafact" that depository institutions such as MSTC do not claim any entitlement to funds which, in his words, become "stuck" in the chain of securities distribution. *Report of the Special Master* at B-22. This "metafact", at least as it relates to securities depositories such as MSTC and PDTC, is apparently based on the Special Master's examination of DTC operations. DTC has apparently disclaimed any ownership interest in the funds involved in this case. Report of the Special Master at 10 n.8. In contrast to DTC, MSTC and PDTC do claim entitlement to certain securities, interest payments, dividends and distributions that cannot be accounted for. Under their S.E.C. approved rules, they are entitled to retain these items in appropriate circumstances, placing them in a contingency reserve.

With respect to securities, for example, the MSTC rules provide that:

> In the event the Corporation should determine that the amount of any Security which it holds in its inventory exceeds the amount of such Security which, according to its accounting records, it is obligated to deliver (such determination being herein called "overage determination"), the Corporation shall do the following:

> (i) The Corporation shall use its best efforts to determine which Participant is entitled to the receipt of such Security.
>
> (ii) After three months from the date of the overage determination, the Corporation may make such use of the Security as the officers of the Corporation may deem desirable and in the best interests of the Corporation.
>
> (iii) After two years from the date of the overage determination, the Corporation shall have the right to sell such Security and to deposit the proceeds from such sale in the Contingency Reserve of the Corporation.

Art. VI, Rule 1, *Midwest Stock Exchange Guide*, (CCH) ¶ 3251. The only securities held by MSTC are those which have been deposited by MSTC Participants, or which constitute distribution on such securities. Each MSTC Participant has agreed that any excess securities held by MSTC shall become its property after two years. A similar MSTC rule relates to excess dividends, interest payments, or other distributions. See Art. IV, Rule 1, *Midwest Stock Exchange Guide*, (CCH) ¶ 3231. PDTC operates under rules which are similar to the MSTC rules in these respects.

MSTC and PDTC would thus take exception to the Report of the Special Master to the extent that it may be viewed as relating to their operations. Of course, the Report of the Special Master is technically correct in that he refers to the "excess, unclaimed distributions at issue in this action." (*Id.*) With respect to securities depositories, the actual funds which are the subject of this action include only excess cash and securities held by DTC.

Obviously, the question of MSTC's and PDTC's entitlement to the excess funds under their rules is not before this Court. They wish merely to advise the Court that the Special Master's Report does not accurately reflect

the situation of two of the three securities depositories to which he specifically refers.

Respectfully submitted,

MICHAEL FISCHER *
FOLEY & LARDNER
777 East Wisconsin Avenue
Milwaukee, WI 53202-5367
(414) 289-3749

GEORGE T. SIMON
FOLEY & LARDNER
70 West Madison Street
Chicago, IL 60602-4208
(312) 444-9500

ILENE KNABLE GOTTS
FOLEY & LARDNER
1775 Pennsylvania Avenue, N.W.
Washington, D.C. 20006-4680
(202) 862-5300

Attorneys for Amici Curiae Midwest Securities Trust Company and Philadelphia Depository Trust Company

* Counsel of Record

Dated this 26th day of May, 1992.

(45)

No. 111 Original

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

On the Report of the Special Master

BRIEF FOR THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA IN RESPONSE TO EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK TO THE REPORT OF THE SPECIAL MASTER

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney General
YEORYIOS C. APALLAS
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for Plaintiff-Intervenor State of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

July 27, 1992

[Attorneys General of Alabama, *et al.* Listed Inside]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS GENERAL OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, *ET AL.*

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

CHRIS GORMAN
Attorney General of Kentucky
700 Capitol Avenue
Capitol Building, Suite 116
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN112
Trenton, New Jersey 08625
(609) 292-4925

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARIO J. PALUMBO
Attorney General of West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 348-2021

MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

JOHN P. ARNOLD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301-
6397
(603) 271-3658

NICHOLAS J. SPAETH
Attorney General of
North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General of Washington
Highways-Licenses Building,
PB71
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

QUESTIONS PRESENTED

1. Whether the Special Master correctly concluded that, when the identity and address of the ultimate intended recipient of a securities distribution are unknown, the State of the issuer of the security on which the distribution was paid has escheat priority—under the backup rule of *Texas* v. *New Jersey*—over the State of whatever financial intermediary happens to be holding the distribution when it becomes stuck in the course of transmission.

2. Whether the Special Master correctly rejected the claim of the State of New York that it is entitled—under the primary rule of *Texas* v. *New Jersey*—to owner-unknown distributions held by brokerage-firm intermediaries because the next intermediary in the chain of distribution is theoretically knowable.

3. Whether, as the Special Master has proposed, an issuer's location for purposes of the backup rule should be defined as the State in which the issuer maintains its principal executive offices because (a) it is far more equitable to look to that State than to use State of incorporation as a proxy, and (b) "principal executive offices" information is now readily accessible from issuers' public filings.

4. Whether the Special Master correctly concluded that all of the funds in dispute in this case should be distributed in accordance with his recommendations that (a) escheat priority be given to the State of the issuer, and (b) the issuer's State should be defined as the State in which it maintains its principal executive offices.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT	3
SUMMARY OF ARGUMENT	9
ARGUMENT	11
I. THE SPECIAL MASTER CORRECTLY INTERPRETED AND APPLIED THE "BACKUP RULE" OF *TEXAS* v. *NEW JERSEY* TO GIVE THE STATE OF THE ISSUER PRIORITY TO ESCHEAT UNCLAIMED SECURITIES DISTRIBUTIONS WHEN THE IDENTITY AND ADDRESS OF THE BENEFICIAL OWNER ARE UNKNOWN	11
A. The Special Master's Interpretation Of *Texas* v. *New Jersey* Is Faithful To The Holding And Rationale Of That Case	13
B. The Delaware-New York Theory Is Inconsistent With *Texas* v. *New Jersey*	18
C. The Report's Recommended Application Of The Backup Rule Furthers The *Texas* v. *New Jersey* Policies Of Fairness And Ease Of Administration	23
1. Escheat to the issuer's State is more equitable	23
2. Escheat to the issuer's State is easier to administer	28
II. THE SPECIAL MASTER PROPERLY REJECTED NEW YORK'S PROPOSED DISTORTION OF THE PRIMARY RULE	34

TABLE OF CONTENTS—Continued

Page

A. All Evidence Demonstrates That The Unclaimed Distributions Held By Brokerage Firms Are Owner-Unknown 36

B. New York's Assertion Regarding The Cause Of Overages At Brokerage Firms Is Unsupported By The Record 41

C. "Trading Address" Is A Contrived Term, Created By New York For Purposes Of This Litigation 44

III. THE COURT SHOULD ADOPT THE SPECIAL MASTER'S SEPARATE RECOMMENDATION THAT FOR PURPOSES OF THE BACKUP RULE THE LOCATION OF AN ISSUER SHOULD BE DEFINED AS THE STATE IN WHICH IT MAINTAINS ITS PRINCIPAL EXECUTIVE OFFICES 45

A. It Is Far More Equitable To Define The Location Of An Issuer As The State In Which It Maintains Its Principal Executive Offices.. 46

B. A "Principal Executive Offices" Definition Can Be Readily Implemented 49

C. Adopting The Master's Proposed Definition Would Be An Appropriate Exercise Of This Court's Power 51

IV. THE SPECIAL MASTER'S RECOMMENDATIONS SHOULD BE APPLIED TO ALL FUNDS WRONGFULLY SEIZED BY NEW YORK 53

CONCLUSION 58

TABLE OF AUTHORITIES

Cases: **Page**

American Trucking Ass'ns v. *Smith*, 496 U.S. 167 (1990) 54

Appeal of Rogers, 361 Pa. 51, 62 A.2d 900 (1949) 21

Ashland Oil, Inc. v. *Caryl*, 110 S. Ct. 3202 (1990) (per curiam) 54, 55

Bank of America Nat'l Trust & Sav. Ass'n v. *Cranston*, 252 Cal. App. 2d 208, 60 Cal. Rptr. 336 (1967) 19

Burnet v. *Harmel*, 287 U.S. 103 (1932) 17-18

California v. *Texas*, 437 U.S. 601 (1978) 17

Chevron Oil Co. v. *Huson*, 404 U.S. 97 (1971) 8, 54, 55

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) 27

Colorado v. *New Mexico*, 459 U.S. 176 (1982) 17

Commissioner v. *Scatena*, 85 F.2d 729 (9th Cir. 1936) 19

Commonwealth v. *Binenstock*, 358 Pa. 644, 57 A.2d 884 (1948) 21

Connecticut v. *Massachusetts*, 282 U.S. 660 (1931) 17

Connecticut Mut. Life Ins. Co. v. *Moore*, 333 U.S. 541 (1948) 13, 57

Copperweld Corp. v. *Independence Tube Corp.*, 467 U.S. 752 (1984) 17

Davis v. *Fraser*, 307 N.Y. 433, 121 N.E.2d 406 (1954) 23

Funk v. *United States*, 290 U.S. 371 (1933) 52

In re Associated Gas & Elec. Co., 137 F.2d 607 (2d Cir. 1943) 19, 20

In re Interborough Consol. Corp., 267 F. 914 (S.D.N.Y. 1920) 20

In re Interborough Consol. Corp., 288 F. 334 (2d Cir.), *cert. denied*, 262 U.S. 752 (1923) 19, 20

In re Menschefrend's Estate, 283 A.D. 463, 128 N.Y.S.2d 738 (1954), *aff'd*, 8 N.Y.2d 1093, 170 N.E.2d 902, 208 N.Y.S.2d 453 (1960), *cert. denied*, 365 U.S. 842 (1961) 57

TABLE OF AUTHORITIES—Continued

	Page
James B. Beam Distilling Co. v. *Georgia*, 111 S. Ct. 2439 (1991)	55, 57
Kamen v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711 (1991)	14
McKesson Corp. v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990)	56
Merrill Lynch Pierce Fenner & Smith, Inc. v. *North European Oil Royalty Trust*, 490 A.2d 558 (Del. 1985)	24
Mississippi Band of Choctaw Indians v. *Holyfield*, 490 U.S. 30 (1989)	17
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978)	27
Moragne v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970)	53
New England Merchants Nat'l Bank v. *Old Colony Trust Co.*, 385 Mass. 24, 429 N.E.2d 1143 (1982)	30
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	52
Pennsylvania v. *New York*, 407 U.S. 206 (1972)	*passim*
Runyon v. *McCrary*, 427 U.S. 160 (1976)	52
Sherry v. *Union Gas Utilities, Inc.*, 20 Del. Ch. 60, 171 A. 188 (1934)	19-20
Snyder v. *Massachusetts*, 291 U.S. 97 (1934)	12
Staats v. *Biograph Co.*, 236 F. 454 (2d Cir. 1916)	19
Standard Oil Co. v. *New Jersey*, 341 U.S. 428 (1951)	13, 26
State v. *American Sugar Ref. Co.*, 20 N.J. 286, 119 A.2d 767 (1956)	13
State v. *Amoco Indus.*, 48 N.J. 544, 226 A.2d 715 (1967)	29
State v. *F.W. Woolworth Co.*, 45 N.J. Super. 259, 132 A.2d 350 (1957)	13
State v. *Jefferson Lake Sulphur Co.*, 36 N.J. 577, 178 A.2d 329, *cert. denied*, 370 U.S. 158 (1962)	19, 20
State v. *Standard Oil Co.*, 5 N.J. 281, 74 A.2d 565 (1950), *aff'd*, 341 U.S. 428 (1951)	20

TABLE OF AUTHORITIES—Continued

	Page
Texas v. *New Jersey*, 379 U.S. 674 (1965)	*passim*
Trammel v. *United States*, 445 U.S. 40 (1980)	52
Utah Junk Co. v. *Porter*, 328 U.S. 39 (1946)	12
Walz v. *Tax Comm'n of City of New York*, 397 U.S. 664 (1970)	12
Western Union Tel. Co. v. *Pennsylvania*, 368 U.S. 71 (1961)	13, 26
Federal Statutes:	
12 U.S.C. §§ 2501-2503	27, 54
12 U.S.C. § 2501(3)	27
Securities Act of 1933	49, 50
Securities Exchange Act of 1934	49, 50
Trust Indenture Act of 1939, 15 U.S.C. § 77aaa *et seq.*	22
15 U.S.C. § 77qqq(b)	22
State Statutes:	
Ala. Code § 35-12-34 (1975)	51
Del. Code Ann. tit. 12, § 1203(c) (1987)	51
New York Abandoned Property Law	8, 57
§ 300(1)(e)	8, 55
§ 300(4)	55
§ 511	37
§ 511(1)	8, 36
§ 511(1-a)	8, 36
Article V-A	35
Pa. Stat. Ann. tit. 27, § 241 (1958)	21
Pa. Stat. Ann. tit. 27, § 332 (1958)	21
Revised Uniform Disposition of Unclaimed Property Act	27
Uniform Unclaimed Property Act of 1981	27, 30
§ 1(8)	30
Rules and Regulations:	
17 C.F.R. § 240.15c2-11	50
17 C.F.R. § 240.15c3-3(a)(1)	50

TABLE OF AUTHORITIES—Continued

	Page
17 C.F.R. § 240.15c3-3(e)(1)	40
17 C.F.R. § 240.15c3-3a, Exhibit A	40
Securities and Exchange Commission Rule 15c3-3 (1972)	40, 41
Uniform Commercial Code:	
U.C.C. § 8-207	30
U.C.C. § 8-207(1)	29
Miscellaneous:	
Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 Stan. L. Rev. 175 (1983)	4
Douglas G. Baird & Thomas H. Jackson, *Security Interests in Personal Property* (2d ed. 1987)	4
1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* (2d ed. 1991 Supp.)	47-48
George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 924 (rev. 2d ed. 1982)	20
Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921)	52
Clearinghouse Reporting Service, *Unclaimed Property Reporting Manual*	34
1 *Corporation Guide* ¶ 903 (Prentice Hall Law & Business 1990)	22
The CUSIP Directory (1990)	31
1989 Depository Trust Company Annual Report	5
Depository Trust Company, Shareholder Communications and The Depository Trust Company (2d ed.)	24
Dialog Information Retrieval Service, *Disclosure Database* (1989)	50
Dialog Information Retrieval Service, *Standard & Poor's Corporate Descriptions* (1988)	50
"DiscAPECS Eases Compliance Woes," *Insurance Software Review* (April/May 1990)	34

TABLE OF AUTHORITIES—Continued

	Page
The E-Z Telephone Directory of Brokers and Banks (1986)	45
11 William M. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5322 (1986)	20
"High Hopes, High Costs for Wall Street's High Technology," *The Economist* (Feb. 2, 1991)	34
Thomas H. Jackson, *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. Chi. L. Rev. 1051 (1983)	4
Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985)	4
Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law* (1986)	4
Thomas H. Jackson & Robert E. Scott, *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989)	4
W. John Moore, "Corporate Kidnapping," 19 *National Law Journal* 1518 (June 13, 1987)	49
National Association of Securities Dealers By-Laws, Schedule H	50
1 Raymond Natter, et al., *Banking Law* § 9.05 (1992)	21
New York Office of Unclaimed Funds, *Handbook for Reporters of Unclaimed Funds* (1983)	37
New York Office of Unclaimed Funds, *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988)	37
New York Stock Exchange, *Fact Book For The Year 1991* (1992)	33
New York Stock Exchange, *Interpretation Handbook*, Vol. 1 (1986)	40-41
2 John N. Pomeroy, *Equity Jurisprudence* § 406 (1941)	26
The Prudential Unclaimed Equities Division, *Introduction to Prudential's Abandoned Property Service*	34
Restatement (Second) of Agency § 13 (1958)	21

TABLE OF AUTHORITIES—Continued

	Page
Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. Econ. & Organization 225 (Fall 1985)	48
Securities Industry Association, *Securities Industry Yearbook 1987-88*	45
Unclaimed Property Clearinghouse, *Voluntary Compliance Manual* (1992)	34
U.S. Congress, Office of Technology Assessment, *Electronic Bulls and Bears: U.S. Securities Markets and Information Technology* (1990)	34

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

On the Report of the Special Master

BRIEF FOR THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA IN RESPONSE TO EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK TO THE REPORT OF THE SPECIAL MASTER

INTRODUCTION

This consolidated brief is submitted on behalf of thirty-one States in response to the Exceptions filed by plaintiff Delaware and defendant New York to the Report of Special Master Thomas H. Jackson, dated January 28,

1992 ("Report").[1] These thirty-one States respectfully urge the Court—as do sixteen other States and the District of Columbia—to adopt and enter the proposed decree set forth as Appendix A to the Report.

The Special Master's Report and proposed decree interpret and apply the rules delineated in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), with respect to the escheat of securities distributions (*e.g.*, dividends and interest payments) that become stuck in the hands of financial intermediaries (*e.g.*, brokerage firms, banks, and depositories) in the course of transmission from the originators (*i.e.*, governmental and corporate issuers of securities) to the ultimate intended recipients (*i.e.*, their beneficial owners), when the names and addresses of those recipients are unknown.[2]

All fifty States and the District of Columbia have appeared in this case.[3] Forty-seven States and the Dis-

---

[1] Exceptions and Brief in Support for Plaintiff, State of Delaware (May 1992) ("Del. Br."); Exceptions of the State of New York to the Report of the Special Master (May 26, 1992) ("N.Y. Br.").

[2] As the Report explains, most States exercise a "custodial taking" power over intangible property subject to potential rights of superior claimants, rather than outright "escheat." Report 2 n.1. For convenience, briefs before the Special Master and the Master's Report itself generally use the terms interchangeably. We continue this practice in this brief.

[3] Delaware served its Complaint on "each of the other states, in order that any other state which might believe it has some claim to the [unclaimed distributions] may seek leave of this Court to intervene in these proceedings." Complaint of Delaware at 2-3, ¶ 5 (Feb. 9, 1988). Every remaining State (and the District of Columbia) has since accepted Delaware's invitation and has intervened, or sought leave to intervene, in this case. This Court granted Texas's motion for leave to intervene on February 21, 1989, and referred the motions subsequently filed by the other States and the District of Columbia to the Special Master. The Special Master has recommended that the Court grant all of these motions, including those filed by the undersigned States. For the reasons stated in Appendix C to the Report, we urge the Court to adopt the Special Master's recommendation with respect to intervention.

trict of Columbia endorse the Special Master's recommendations in their entirety.[4] The only substantive exceptions to the Report are taken by Delaware and by New York, which seek disproportionate amounts of unclaimed distributions (to a large extent on conflicting theories) based, respectively, on the fortuities that a large majority of financial intermediaries either (1) are incorporated in Delaware or (2) are incorporated in New York State or maintain offices in New York City.

The Special Master's statement of the undisputed facts and his carefully reasoned analysis and application of the principles prescribed in *Texas* v. *New Jersey* are the most forceful arguments for fully accepting his recommendations. This brief, therefore, is limited to responding to the attacks that Delaware and New York level upon the Master's Report.

STATEMENT

As in the Court's earlier original actions of *Texas* v. *New Jersey* and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), this controversy centers on competing claims by States to escheat unclaimed funds. The precise question presented is how the "backup rule" delineated in *Texas* v. *New Jersey*—a rule intended to govern unclaimed property that cannot be disposed of under the Court's "primary rule"[5]—should be applied to unclaimed securities distributions taken by New York. To be determined is

---

[4] Massachusetts has sought leave to intervene, but has taken no position either before the Master or this Court. Although Michigan, Maryland, Nebraska, and the District of Columbia have filed a document entitled "Exceptions" and a brief in support thereof, their position is that they "endorse the Master's result, although [they] think it is possible to improve upon it." Brief at 2.

[5] Under the primary rule of *Texas* v. *New Jersey*, escheat is to the State of the last known address of the ultimate intended recipient (termed the "creditor" by the Court). Property escheats under the backup rule when the name and address of the intended recipient are unknown.

whether the State of the issuer or the State of the intermediary is to be accorded priority under the federal common law rules announced in *Texas* v. *New Jersey*. The Special Master recommends the former.[6]

The Special Master's Report followed extensive discovery from both parties and representative non-parties to elucidate the nature of the securities distribution system, the transactions involved in this case, and the roles of the various participants in them. *Inter alia*, depositions were conducted of the principal securities depository company, three brokerage firms, and a major bank acting as both a dividend disbursing agent and a custodian of securities. The Special Master received several rounds of briefs and heard extensive oral argument. Four months after oral argument, he circulated a draft of his Report to the parties for fact-checking and comment; every party commented. There were then two supplemental rounds of briefing before the Master issued the final Report.[7]

The undisputed facts show that it is now common to have multiple intermediaries involved in distributing cash

---

[6] The Special Master also recommends, separately, a "minor change" in the criterion for defining the location of the issuer from that articulated in *Texas* v. *New Jersey*. That recommendation, discussed *infra* at 7, 45-53, does not affect the fundamental choice between the State of the issuer and the State of the conduit intermediary.

[7] Professor Thomas H. Jackson, the former Dean of the University of Virginia School of Law, is a recognized authority on debtor-creditor relations. *E.g.*, *Security Interests in Personal Property* (2d ed. 1987) (with Douglas G. Baird); *The Logic and Limits of Bankruptcy Law* (1986); *On the Nature of Bankruptcy: An Essay on Bankruptcy Sharing and the Creditors' Bargain*, 75 Va. L. Rev. 155 (1989) (with Robert E. Scott); *The Fresh-Start Policy in Bankruptcy Law*, 98 Harv. L. Rev. 1393 (1985); *Possession and Ownership: An Examination of the Scope of Article 9*, 35 Stan. L. Rev. 175 (1983) (with Douglas G. Baird); *Embodiment of Rights in Goods and the Concept of Chattel Paper*, 50 U. Chi. L. Rev. 1051 (1983).

and stock dividends, interest, and other payments from a corporate or governmental securities issuer to the ultimate recipients of those distributions, *i.e.*, to the beneficial owners of the stocks and bonds. Following the "paperwork crisis" of the late 1960s, the securities industry created a centralized certificate depository so that brokerage firms could "deliver" securities to each other simply by making accounting entries on the depository's books. This function is now performed by the Depository Trust Company ("DTC"), a limited purpose trust company incorporated in New York, which serves as a national depository for every segment of the industry. All securities certificates in this depository are registered in the name of DTC's nominee, Cede & Co., and held by DTC in fungible masses.[8] Additionally, a large and growing percentage of investors leave their securities in the possession of their brokerage firms or banks, which results in the securities' being held in the intermediary's "street name" or nominee name.

The result is that the issuers or, more commonly, their paying agents, make a large volume of distributions of dividends and interest to intermediary record owners that are not the beneficial owners. If the record owner is a depository, the depository then passes the distributions on to its participating banks and brokerage firms, which in turn pass them on to their customers—the beneficial owners—or to other intermediaries,

---

[8] As of December 31, 1989, DTC's inventory of deposited securities had a market value of four trillion dollars, representing approximately 98 percent of the total estimated market value of securities held by all U.S. depositories. 1989 DTC Annual Report at 5 (appended as Exhibit 1 to Brief in Support of Motion for Partial Summary Judgment of the Plaintiff-Intervenor States of Alabama, *et al.* (Oct. 30, 1990) ("Brief in Support of Alabama, *et al.*")). DTC holds approximately 75 percent of all outstanding corporate and municipal debt and equity securities. Brief of *Amici Curiae* [Securities Industry Association, *et al.*] in Response to the Report of the Special Master 3 (May 26, 1992) ("SIA *Amici* Br.").

which in turn pass them on to their customers. Thus, a distribution typically will pass through the hands of several intermediaries in its transmission from the issuer to the ultimate intended recipient. The role of all these intermediaries in this regard is simply to transmit, or to assist in the transmission of, the issuer's distribution to the beneficial owner.

In a very small fraction of these cases (which nonetheless amount to substantial dollars in the aggregate), the issuers' payments become "stuck" with one or another intermediary because the intermediary is unable to determine to whom to transmit them. Report 10. All of the intermediaries that have testified, or filed briefs, in this case agree that the owners of the undelivered distributions at issue in this case are unknown. *Id.* 10-11 & nn.8 & 10.[9]

The Report makes two principal recommendations for resolving competing state claims to such owner-unknown, unclaimed securities distributions held by intermediaries, *i.e.*, distributions whose owners' addresses are unknown and therefore to which the *Texas* v. *New Jersey* primary rule cannot be applied.

First, the Report finds that this Court's backup rule in *Texas* v. *New Jersey* gives priority to the State of the issuer that originated the distribution rather than to the State of the conduit intermediary. The Report concludes that (1) use of the term "debtor" in the original formulation of the backup rule was descriptive only; (2) this Court did not incorporate mechanistically the debtor-creditor laws of the various States; (3) the fundamental economic relationship is between the issuer and the bene-

---

[9] *Amici* Midwest Securities Trust Company and Philadelphia Depository Trust Company, two relatively small securities depositories, have advised the Court that they assert an ownership interest based upon their respective depository rules in the unclaimed distributions held by their participating intermediaries. These *amici* do not dispute, however, that the distributions in this case are owner-unknown. Whether such private agreements must give way to a State's unclaimed property statute is not before this Court.

ficial owner; and (4) with respect to a securities distribution, allocation to the State of the issuer rather than to the State of the financial intermediary best comports with the principles and purposes set forth in *Texas* v. *New Jersey*.

In making this recommendation, the Report rejects under the backup rule both New York's claim to all of the unclaimed distributions that it has seized from DTC and New York-incorporated banks, and Delaware's claim to all of the unclaimed distributions that New York has taken from Delaware-incorporated brokerage firms. The Report also categorically rejects New York's separate and inconsistent attempt to justify—under the primary rule—its seizure of distributions held by brokerage firms that have an office in New York City, regardless of the State of their incorporation. The Report finds baseless New York's contention that those particular distributions should be considered owner-known on the strength of New York's assertion that it theoretically could establish that a securities certificate on which a particular unclaimed distribution was paid was forwarded to another broker with a so-called "trading address" in New York, since New York does not even contend that any such other broker would necessarily have held the certificate on the record date, much less be the ultimate intended recipient of the distribution. Report 58-67.

Second, the Report separately recommends that the definition of an issuer's location under the backup rule be modified to be the State in which the issuer maintains its "principal executive offices," as specified on filings required by the Securities and Exchange Commission, rather than the State of its incorporation.[10]

---

[10] When the issuer cannot be identified, then and only then would the Report allow escheat to the holding intermediary's State. Report 57. No exception has been raised by any party to this tertiary rule. Additionally, the proposed decree requires, pursuant to *Texas* v. *New Jersey*, that any distribution for which an address of the

Lastly, the Report concludes that the decision in this case should be applied to all disputed property taken by New York. The Report finds that there should be no bar to complete application of the first recommendation (the priority of the State of the issuer over the State of the intermediary) because, among other reasons, the recommendation "is a logical interpretation of prior precedents in this area" (*id.* 73), and therefore not law-changing within the meaning of *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106 (1971). Although the proposed change in the backup rule's locational definition "come[s] closer to meeting" this threshold *Chevron Oil* test, the Report finds that New York lacked the requisite reliance because New York has not taken any distributions as the State of incorporation of the issuer.[11] The Report further finds that New York does not have any remedial defenses, such as statute of limitations or laches, and that any hardship New York might face "represents a calculated risk New York has imposed on itself, and not an unjust surprise or unfair burden." Report 76 n.68.

---

underlying security's beneficial owner is known must be given, under the primary rule, to the State of that address if consistent with that State's own escheat laws. *Id.* A-2 to A-3 (Proposed Decree, ¶ 2).

[11] New York has taken distributions under a custodial-taking statute that is so plainly inconsistent with *Texas* v. *New Jersey* that New York does not even attempt to defend it in its own terms. The Abandoned Property Law ("APL") under which New York has taken custody of such funds purports to authorize that State, for example, to seize all unclaimed distributions "received" in New York "by a broker or dealer or nominee of such broker or dealer," APL §§ 511(1), 511(1-a), as well as all unclaimed distributions "held or owing" by banking organizations (including DTC) in New York, APL § 300(1)(e). New York's statutes therefore allow New York to recover unclaimed distributions even when it is undisputed that the last known address of the owner of the property is in another State or, as to owner-unknown property, that the "debtor" is domiciled in another State.

SUMMARY OF ARGUMENT

I. The Special Master's interpretation and application of the backup rule of *Texas* v. *New Jersey* as giving priority to the State of the originator of unclaimed distributions is faithful to the holding and policies of that decision, is the fairest rule, is easily administered, and is acceptable to all but two States. The arguments advanced by Delaware and New York in favor of the State of the intermediary rest entirely upon the erroneous premise that this Court's decision in *Texas* v. *New Jersey* meant to incorporate state debtor-creditor law mechanistically into its backup rule. This state law premise fundamentally misconceives the rationale of *Texas* v. *New Jersey*. The federal rules prescribed in that case give priority—where, as here, it is consistent with ease of administration—to the State of the entity whose economic activities created the unclaimed securities distribution, *i.e.*, the issuer of the security, rather than to the State of whatever intermediary happens to be holding that distribution when a breakdown occurs in its transmission. The Report thus correctly rejects under the backup rule New York's claim to the owner-unknown distributions it has seized from DTC and banks, as well as Delaware's claim to the distributions that New York has taken from Delaware-incorporated brokerage firms.

II. The evidence is undisputed that the distributions New York has seized from brokerage firms are also owner-unknown and therefore subject to the backup rule. Before this litigation commenced, New York publicly acknowledged that these distributions are owner-unknown. New York's current argument that property taken from brokerage firms (but not from DTC and banks) is owner-*known* within the meaning of the primary rule is a *post hoc* effort to justify its taking under a statute that authorizes New York to recover unclaimed distributions that are, without more, "received in" New York. Furthermore, New York's contention that the property should be considered owner-known because, in theory (but not as a practical

matter), New York might be able to identify the next (but not final) link in the broken distribution chain, depends upon a string of unsupported presumptions, and proves nothing about who owns the property.

III. The Court should adopt the Special Master's recommendation that the location of an issuer for purposes of the backup rule be defined as the State in which the issuer maintains its principal executive offices as reported on standardized SEC forms, which issuers of publicly traded securities are required to file and which are today readily accessible through computer databases. It is far more equitable to define an issuer's location as the State in which it maintains its principal executive offices, among other reasons, because this definition more closely rewards the State in which the intangible property was created. Because using principal executive offices as a reference point would now have the same virtues of clarity and ease of administration as using State of incorporation, its adoption would significantly further the policies underlying *Texas* v. *New Jersey*.

IV. The Special Master's recommendations should apply to all of the funds New York has wrongfully seized. Both the Master's choice of the State of the issuer and his rejection of New York's primary rule theory involve the interpretation and application of governing precedent. The Master's proposed modification of the backup rule's locational definition is an acknowledged change in law, but New York's taking statute and practices are inconsistent with any claim that it has relied to its detriment upon the locational definition used in *Texas* v. *New Jersey*. Those seizures that New York now defends under the backup rule were made under a statute that New York does not even attempt to defend in its own terms—a statute reaching all unclaimed intangible property "held or owing" in New York. Moreover, since New York does not even claim to have taken these distributions as the State of the issuers, it could not have relied upon the use of State of incorporation in *Texas* v. *New Jersey* as a proxy for an issuer's location.

ARGUMENT

I. THE SPECIAL MASTER CORRECTLY INTERPRETED AND APPLIED THE "BACKUP RULE" OF *TEXAS* v. *NEW JERSEY* TO GIVE THE STATE OF THE ISSUER PRIORITY TO ESCHEAT UNCLAIMED SECURITIES DISTRIBUTIONS WHEN THE IDENTITY AND ADDRESS OF THE BENEFICIAL OWNER ARE UNKNOWN

Both Delaware and New York take issue with the Special Master's interpretation and application of the federal rules of escheat delineated in *Texas* v. *New Jersey*, arguing, based essentially on state debtor-creditor law, that those rules favor the intermediary holder of unclaimed securities distributions. For the reasons set forth below, Delaware and New York misperceive the Court's decision in *Texas* v. *New Jersey*. Far from incorporating various technical definitions of state law as they might change over time, or vary from State to State, the Court there explicitly set out to establish overarching federal rules of equitable priority to supersede state laws. When the beneficial owner's last known address cannot be determined, the backup rule established by this Court intended to give escheat priority to the State of the entity whose economic activities created the unclaimed intangible property.

Delaware and New York argue against this result on the strength of an overly mechanistic application of the terms "debtor" and "creditor," ostensibly required by *Texas* v. *New Jersey* and *Pennsylvania* v. *New York*. Their briefs are thus largely devoted to technical arguments as to why each intermediary in the chain of distribution assumes and then relinquishes the status of "debtor" under state law as it first receives and then passes along payments to the next intermediary. These two States then extrapolate that whatever intermediary happens to possess funds when they become "stuck" is a "debtor" within the meaning of the *Texas* v. *New Jersey*

rule and that, as a simple matter of *stare decisis*, the State of that intermediary is entitled to seize the funds.

As Justice Cardozo observed in *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1934), "the tyranny of labels" is a "fertile source of perversion" in legal analysis. When "a court frames a rule which is general in form, though it has been wrought under the pressure of particular situations," soon thereafter "another situation is [sought to be] placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Id.* "In such circumstances the solution of the problem is not to be found in dictionary definitions * * *." *Id.* at 115. Rather, it is to be found in an analysis of the Court's original purpose. In a similar vein, this Court has stated that "literalness may strangle meaning," *Utah Junk Co.* v. *Porter*, 328 U.S. 39, 44 (1946), and has cautioned against the "hazards of placing too much weight on a few words or phrases of the Court," *Walz* v. *Tax Comm'n of City of New York*, 397 U.S. 664, 670 (1970).

The Delaware-New York approach disregards these admonitions, and attempts to force federal rules of priority into the confining labels of state law concepts used in other contexts to meet other needs. It seeks to steer the *Texas* v. *New Jersey* analysis away from its core purposes—fairness and ease of administration—by pursuing dictionary definitions of "debtor" (Del. Br. 32) and commercial law rules-of-thumb as to when a corporation that has paid dividends to the record owner may or may not be liable to the beneficial owner (N.Y. Br. 61). Delaware and New York attempt to legitimize their focus on labels by waving the banner of *stare decisis*. As they are fully aware, however, no party, nor the Special Master, asks this Court to overrule *Texas* v. *New Jersey*. Instead, the issue is interpreting that decision and applying it properly in the particular context presented here.

A. The Special Master's Interpretation Of *Texas* v. *New Jersey* Is Faithful To The Holding And Rationale Of That Case

Prior to 1965, this Court had broadly affirmed the power of individual States to escheat intangible property, thereby encouraging States to enlarge the coverage of their escheat statutes in a manner that inevitably led to interstate conflicts.[12] Individual States were defining terms such as "holder" and indeed, as we explain below, "debtor" expansively so as to extend their escheat statutes to the outermost jurisdictional limits. The Court's express purpose in *Texas* v. *New Jersey* was to bring order out of a chaos of conflicting state laws by establishing federal priority rules to prevent overlapping exercises of state power. 379 U.S. at 677.[13] The task the Court there set for itself was thus altogether different from the Court's approach in unrelated decisions, cited by Delaware and

---

[12] *Compare, e.g., State* v. *F.W. Woolworth Co.*, 45 N.J. Super. 259, 132 A.2d 550 (1957) (allowing New Jersey to escheat a foreign corporation's unclaimed dividends payable to shareholders whose last known addresses were in New Jersey), *with State* v. *American Sugar Ref. Co.*, 20 N.J. 286, 119 A.2d 767 (1956) (upholding New Jersey's power to escheat unclaimed dividends of a New Jersey corporation payable to persons whose last known addresses were in other States).

This Court noted in *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 79 n.5 (1961), that at least twenty States had enacted legislation during the previous fifteen years to bring or enlarge the coverage of intangible transactions under their escheat statutes. The Court held in *Western Union* that Pennsylvania's attempt to escheat unclaimed money orders held by Western Union violated due process because a judgment of escheat for Pennsylvania would not protect the company from multiple liability to other States. *Id.* at 76-77. The opinion invited the States to invoke the Court's original jurisdiction to fashion federal rules to allocate escheat power among the States. *Id.*

[13] *See also Western Union Tel. Co.*, 368 U.S. at 79; *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 443-45 (1951) (Frankfurter, J., dissenting); *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 563 (1948) (Jackson, J., dissenting).

New York, in which jurisprudential considerations favored allowing state-law regimes to define the circumstances under which federal "common law" rules would operate within a particular State.[14]

In *Texas* v. *New Jersey*, four States were seeking to escheat all or part of uncollected funds that Sun Oil Company had unsuccessfully attempted to distribute to approximately 1,730 "small creditors." 379 U.S. at 675. The moneys in question ran the gamut from wages and payments to suppliers, to oil and gas royalties and "mineral proceeds," to cash and stock dividends payable to shareholders. *Id.* at 675 n.4.

The Court began its analysis by emphasizing its responsibility to adopt federal rules that would settle—on the equitable basis of fairness and ease of administration—competing state law claims. *Id.* at 677. Noting the constitutional inability of individual States to resolve the controversy and the absence of federal legislation, the Court asserted its "responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property." *Id.* The intent of the opinion was plainly to prescribe generally applicable rules of equitable priority among the States with respect to escheat of intangible property.

The Court specifically rejected approaches that would have had those rules hinge upon details of state law. The Court, for example, dismissed out of hand Texas's con-

---

[14] This Court borrowed state law in those cases because private parties had ordered their affairs in reliance on that state law or because the Court was reluctant to disturb a state-law regime. *See, e.g., Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711, 1717 (1991) ("private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards") (*cited in* Del. Br. 48). By contrast, "here, the federal rule is not attempting to fit the federal government into a state debtor-creditor regime." Report 30 n.28.

tention, argued at some length,[15] that royalties, rents, and mineral proceeds were entitled to special treatment because they were "real" property under Texas law. *Id.* at 679 n.9. It likewise rejected Texas's "most significant contacts" proposal, even though Texas had cited "numerous recent decisions of state courts dealing with choice of law in private litigation" espousing such a test. *Id.* at 678 & n.7. The Court also refused to allow its priority rules to be confined by "technical legal concepts of residence and domicile" under state-law regimes. *Id.* at 681.

New Jersey's "State of incorporation" proposal was disallowed because "it seems to us that in deciding a question which should be determined primarily on principles of fairness, [New Jersey's proposed rule] would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." *Id.* at 680. The Court viewed Pennsylvania's proposal of giving priority to the State of the company's principal place of business as "more persuasive" because it was "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Id.* Nonetheless, the Court feared that the subjective nature of Pennsylvania's proposed "principal place of business" test would require too much fact-specific, case-by-case analysis. *Id.*

The Court instead adopted the "primary rule" proposed by intervenor Florida and recommended by its Special Master, holding that, wherever feasible, "the right and power to escheat the debt should be accorded to the State of the creditor's last known address as shown by the debtor's books and records." *Id.* at 680-81. The Court justified its choice primarily on grounds of fairness and

---

[15] *See* Texas's Exceptions to the Report of the Special Master and Supporting Brief, *Texas* v. *New Jersey*, No. 13 Original, at 28-38 (Feb. 14, 1964).

simplicity. The rule was fair because, *inter alia*, it would "tend to distribute escheats among the States in the proportion of the commercial activities of their residents." *Id.* at 680.

For situations in which there is no record of any address or where the last known address is in a State that does not provide for escheat of the property, the Court prescribed what has come to be called the "backup rule." In such situations the State of corporate domicile may escheat the property, subject to any right that another State might subsequently establish under the primary rule. *Id.* at 682. The Court justified this backup rule (also proposed by its Special Master) on the ground that it would be "conducive to needed certainty" in dealing with a problem that seemed "likely to arise with comparative infrequency." *Id.*

In conclusion, the Court explained that the process by which it arrived at the primary and backup rules was "not controlled by statutory or constitutional provisions or by past decisions, nor [was] it entirely one of logic." *Id.* at 683. Rather, it was

> fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States.

Id. Significantly, both the primary rule and the backup rule were objective and focused, respectively, on the ultimate intended recipient of an unclaimed payment (referred to as the "creditor") and on Sun Oil as the originator of those payments (referred to as the "debtor"), even though, as we discuss further at pp. 19-22, *infra*, there were in some instances intermediaries between Sun Oil and its "creditor."

There is no basis for inferring that the Court *sub silentio* incorporated into its priority rules whatever def-

initions of "debtor" might be developed under varying state laws. Any such inference would be at odds with the Court's explicit refusal to adopt state property laws, state conflicts laws, and state residence and domicile laws. It also would be inconsistent with the Court's persistent refusal to allow state laws to determine the rules of decision in other original jurisdiction actions involving the just apportionment of rights among the States. *E.g.*, *Colorado* v. *New Mexico*, 459 U.S. 176, 184 (1982); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669-71 (1931). As Justice Stewart observed in *California* v. *Texas*, 437 U.S. 601, 613 (1978) (concurring opinion), "when this Court exercises its original jurisdiction to settle a dispute between two States it does not look to the law of each State, but rather creates its own rules of decision."

The Special Master's approach here comports with this Court's approach not only in such analogous original jurisdiction cases, but also in cases involving construction of terminology used by Congress. In construing federal statutes, the Court starts with the general premise that Congress would not have intended to make the application of federal law depend upon the vagaries of state law. *Mississippi Band of Choctaw Indians* v. *Holyfield*, 490 U.S. 30, 43 (1989). This rule of construction is based upon two principal concerns: (1) that rigidly applying state law concepts could disrupt the uniformity of the federal law, *id.*, and (2) that it also could impair the underlying purposes of the federal program, *id.* at 44.[16]

---

[16] In *Holyfield*, the Court held that state law of "domicile" does not control the determination whether children are "domiciled" in an Indian reservation within the meaning of the Indian Child Welfare Act. 490 U.S. at 49. This Court has declined to allow federal rules to be constrained by state law definitions in numerous circumstances. *E.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984) (parent and wholly owned subsidiary are not separate entities capable of conspiring with each other under Section 1 of the Sherman Act even though they may be two distinct legal entities under state law); *Burnet* v. *Harmel*, 287 U.S. 103

Both of these concerns apply with full force to the priority rules delineated in *Texas* v. *New Jersey*, which were expressly intended to achieve nationwide uniformity as well as to promote federal equitable policies bearing little, if any, relation to technical state commercial law principles. Moreover, here there is no reason for concern that a self-contained federal rule might unnecessarily upset the operation of state-law regimes. As noted by the Special Master, "whatever rule the Court adopts will not interfere with the method by which securities are distributed." Report 30 n.28.

Nothing in this Court's only other prior decision on escheat priority, *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), alters the above conclusions. That case dealt in relevant part with a situation in which neither the ultimate intended recipient nor the originator of an unclaimed payment could be identified or located in a particular State. At issue were money orders that Western Union was unable either to pay to the intended recipient or to refund to the sender. Consistent with *Texas* v. *New Jersey*, the Court recognized that if the State of the intended recipient's last address or the sender's last address could be determined, that State would have escheat priority. 407 U.S. at 213, 215. Where neither could be determined, however, and thus the only identifiable party was Western Union, the Court adopted its Special Master's recommendation that the funds be escheated to the State where Western Union was located. *Id.* at 214.[17]

B. The Delaware-New York Theory Is Inconsistent With *Texas* v. *New Jersey*

The Delaware-New York interpretation of "debtor" is not merely at odds with the jurisprudential underpinnings

---

(1932) (state law treatment of oil and gas lease as a "sale" of oil is immaterial in deciding whether it is a "sale" of capital assets under federal tax law).

[17] We discuss Congress's legislative response to *Pennsylvania* v. *New York* on page 27 below.

of *Texas* v. *New Jersey*; it does not even succeed on its own terms as a workable explanation of the Court's conclusions in that case. Rather, applying state debtor-creditor law to the various distributions involved in *Texas* v. *New Jersey* would have led to the confused result of having no "debtor" in some circumstances and dual "debtors" in others. In addition, any such effort at determining who the "debtor" is in the Delaware-New York sense would in many situations require precisely the sort of fact-specific, case-by-case analysis that this Court intended to eliminate.

The Court's application of the term "debtor" to Sun Oil as an issuer of securities was necessarily no more than descriptive, without reference to technicalities of state law. To attempt to assign more significance to the "debtor" terminology, as suggested by the Delaware-New York theory, leads only to confusion.

Under generally accepted state common law principles, for example, Sun Oil could not have been characterized as a "debtor" with respect to its cash dividends. Sun Oil had deposited funds for the payment of the cash dividends into a special dividend account in a Philadelphia bank; after two years, unclaimed dividends were transferred from this special dividend account to a general Sun Oil account, also in Philadelphia.[18] Under state common law, the initial deposit made Sun Oil a trustee of the funds it had placed in the special account.[19] In other words, "the

---

[18] Report of the Special Master, *Texas* v. *New Jersey*, No. 13 Original, at 11 (Dec. 2, 1963).

[19] *In re Associated Gas & Elec. Co.*, 137 F.2d 607, 610 (2d Cir. 1943); *Commissioner* v. *Scatena*, 85 F.2d 729, 731 (9th Cir. 1936); *In re Interborough Consol. Corp.*, 288 F. 334, 344-45 (2d Cir.), *cert. denied*, 262 U.S. 752 (1923); *Staats* v. *Biograph Co.*, 236 F. 454, 458 (2d Cir. 1916); *Bank of America Nat'l Trust & Sav. Ass'n* v. *Cranston*, 252 Cal. App. 2d 208, 60 Cal. Rptr. 336, 343-44 (1967); *State* v. *Jefferson Lake Sulphur Co.*, 36 N.J. 577, 178 A.2d 329, 334, *cert. denied*, 370 U.S. 158 (1962); *Sherry* v. *Union Gas Utilities*,

debtor and creditor relation [was] transformed into a trust relation." *In re Interborough Consol. Corp.*, 267 F. 914, 918-19 (S.D.N.Y. 1920). Moreover, since these trust funds could not be diverted for any other purpose, *In re Interborough Consol. Corp.*, 288 F. 334, 344-45 (2d Cir.), *cert. denied*, 262 U.S. 752 (1923); *State* v. *Standard Oil Co.*, 5 N.J. 281, 74 A.2d 565, 575 (1950), *aff'd*, 341 U.S. 428 (1951), a subsequent commingling of such funds with other funds—as apparently occurred in *Texas* v. *New Jersey*—would not have altered the trust relationship.[20] Thus, the Court's use of the term "debtor" to describe Sun Oil plainly was not based on state common law technicalities.

Even more confusion would have resulted from reference to the statutes of the three States involved in *Texas* v. *New Jersey*.[21] Only Pennsylvania's escheat statute used the term "debtor." Like other States, Pennsylvania sought to cast the net of its escheat laws as widely as possible, and thus defined "debtor" specifically to include, *inter alia*, (1) corporations that "have * * * declared dividends or profits," (2) banks that have received deposits of money, and (3) any person or entity holding property "in any fiduciary capacity whatsoever," or that continues to hold any portion thereof even "after the

---

Inc., 20 Del. Ch. 60, 171 A. 188, 190 (1934); 11 William M. Fletcher, *Cyclopedia of the Law of Private Corporations* § 5322, at 730 (1986).

[20] *See, e.g., In re Associated Gas & Elec. Co.*, 137 F.2d at 610; *State* v. *Jefferson Lake Sulphur Co.*, 178 A.2d at 333-34; *State* v. *Standard Oil Co.*, 74 A.2d at 573-76. *See generally* George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 924 (rev. 2d ed. 1982).

[21] Pertinent excerpts of these statutes were attached as appendices to Texas's brief in support of its motion for leave to file the complaint. Brief on Motion for Leave to File Bill of Complaint, *Texas* v. *New Jersey*, No. 13 Original, Appendix A (Texas statute), Appendix B (New Jersey statute), and Appendix C (Pennsylvania statute) (May 1, 1962).

termination of the fiduciary relation."[22] The statute defined "creditor" to include, *inter alia*, those "to whom dividends or profits have been declared," as well as "beneficial owners of any property, money, or estate, or of the profits, accretions, and interest thereon" held by any "debtor."[23] The result of reference to this state law in *Texas* v. *New Jersey* would have been to identify multiple "debtors" with respect to the same property. Both Sun Oil and an intermediary, for example, could be deemed "debtors" under Pennsylvania's statute.[24] This further buttresses the Special Master's conclusion in this case that looking to state definitions of "debtor" creates more problems than it solves.

Delaware and New York attempt to explain this Court's reference to the issuer in *Texas* v. *New Jersey* as a "debtor" on the theory that there, but not here, the intermediaries were transfer and paying agents who "act[ed] for the issuer." Del. Br. 40; *see also* N.Y. Br. 52. This

---

[22] Pa. Stat. Ann. tit. 27, § 241 (1958), *quoted in* Brief on Motion for Leave to File Bill of Complaint at Appendix C-11 (May 1, 1962).

[23] *Id.*, *quoted in* Brief on Motion for Leave to File Bill of Complaint at Appendix C-11 to C-12 (May 1, 1962).

[24] For example, Sun Oil was a statutory "debtor" because it had "declared dividends or profits." The Philadelphia bank holding the cash dividends likewise appears to have been a statutory "debtor" because it had received deposits of money, and also because under general banking law it became a bailee, and thus a fiduciary, of the special account, 1 Raymond Natter, et al., *Banking Law* § 9.05, at 9-24 (1992), and continued to hold these funds even "after the termination of the fiduciary relation." Pa. Stat. Ann. tit. 27, § 241 (1958). *See generally Commonwealth* v. *Binenstock*, 358 Pa. 644, 57 A.2d 884, 886 (1948) (averment that defendant received money as agent or trustee properly alleged that defendant received the money in a fiduciary capacity under Pennsylvania escheat statute); Restatement (Second) of Agency § 13 (1958) (agent as fiduciary). *See also* Pa. Stat. Ann. tit. 27, § 332 (1958) (subjecting to escheat unclaimed property held by "any trustee, bailee or other depositary" in a fiduciary capacity); *Appeal of Rogers*, 361 Pa. 51, 62 A.2d 900, 903 (1949) (§ 332 reaches " 'every person who receives money to be paid to another' " (citation omitted)).

is a distinction without a difference. First, paying agents may be agents of owners as well as issuers.[25] Second, in any event, the question Delaware and New York themselves pose is whether such intermediaries are "debtors" under state law, and paying agents certainly appear to have been "debtors" under Pennsylvania's statute.[26] Delaware in fact concedes that, under the common law, the paying agents may have been "debtors" (of Sun Oil, but not of the beneficial owners), and merely argues that they are not the relevant "debtors" to which to look. Del. Br. 40 n.48.

The harder Delaware and New York try to justify applying a "debtor" approach wedded to state-law schemes, the clearer it becomes that their thesis depends on an intense fact-gathering mission for each case—precisely the exercise that this Court sought to minimize, not maximize. 379 U.S. at 680. New York points to a number of state cases decided before *Texas* v. *New Jersey* holding that a corporation would be protected from liability to the beneficial owner if it paid dividends to the record owner in "good faith." On these terms, New York seems to be arguing that issuers cannot generally be regarded as "debtors" once they make a distribution to the record owner. But no such clear-cut rule emerges from these

---

[25] For example, the Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.*, which applies to most publicly-held corporate debt obligations, requires that a paying agent "hold in trust for the benefit of the indenture security holders or the indenture trustee all sums held by such paying agent for the payment of the principal of or interest on the indenture securities." 15 U.S.C. § 77qqq(b). Dividend disbursing agents may have similar relationships. *See* 1 *Corporation Guide* ¶ 903, at 905 (Prentice Hall Law & Business 1990) (some dividend disbursing agents will not return unclaimed dividends to the issuer, "arguing that they still remain liable to pay out the dividend"). For this reason, New York's contention (Br. 50-56) that "debtor" simply means "obligor" also does not solve the problem; to determine the "debtor," one must still choose among "obligors."

[26] *See supra* notes 22-24 and accompanying text.

cases—and certainly not one helpful to New York. There is, for example, the intensely fact-bound question of whether an issuer made a payment in "good faith." Moreover, an issuer remains a "debtor" under this analysis until the affirmative "good faith" defense is raised in connection with a claim against the issuer by the beneficial owner. *E.g.*, *Davis* v. *Fraser*, 307 N.Y. 433, 121 N.E.2d 406, 412 (1954) (*cited in* N.Y. Br. 61). In addition, these commercial cases have nothing to do with the law of escheat, and do not address the issue of escheat priority.

C. The Report's Recommended Application Of The Backup Rule Furthers The *Texas* v. *New Jersey* Policies Of Fairness And Ease Of Administration

1. *Escheat to the issuer's State is more equitable*

This Court stated in *Texas* v. *New Jersey* that the priority question "should be determined primarily on principles of fairness." 379 U.S. at 680. While Delaware complains that the Special Master approached this case "in populist terms" (Del. Br. 49), using "intuition" rather than logic or precedent (*id.*), in fact he hewed closely to the fairness criteria enunciated by this Court in *Texas* v. *New Jersey*. As a general matter, the allocation of unclaimed intangible property should "tend to distribute escheats among the States in the proportion of the commercial activities of their residents," 379 U.S. at 681, and reward the State "giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence," *id.* at 680. The Special Master's Report serves these goals by recommending the State of the issuer whose business activities gave rise to the intangible property over the State of whatever conduit intermediary happens to be holding those payments when they become "stuck." *See generally* Report 35-38.

New York concedes that the Master's fairness criteria were in fact derived from *Texas* v. *New Jersey* (N.Y. Br.

39), but argues that "fairness is not a concern under the *Texas* backup rule" (*id.* 69). The argument is badly overstated. To be sure, as the Special Master forthrightly acknowledged, this Court's primary focus in formulating the backup rule was upon ease of administration "because, as a rule to be used with relative infrequency (most cases being handled by the primary rule), it allowed the circle to be closed in a manner that provided easily-followed guidance to future cases." Report 17. This hardly means, however, that principles of fairness, which the Court used as its guide in promulgating the priority rules, 379 U.S. at 680, are irrelevant to the interpretation of the backup rule. Report 17. Thus, the Special Master's priority recommendation was appropriately sensitive to the objective of administrative convenience, but it also properly undertook to achieve the most equitable result.

New York argues in retreat that brokers, banks, and depositories "perform a multitude of functions" that should not be ignored in a fairness analysis. N.Y. Br. 71; *see also* Del. Br. 28-29. Even placing to one side the fact that intermediaries such as DTC have described themselves as endeavoring to preserve their "transparency as an element in the chain of communication between corporate issuers and the beneficial owners of their securities,"[27] no one—including the Special Master (Report 36)—denies that these intermediaries provide valuable services. The intermediaries in *Texas* v. *New Jersey* also provided valuable services, but that is not the point.

The point is that the fundamental economic relationship is between the issuer and the beneficial owner.[28] It is the

---

[27] DTC, Shareholder Communications and The Depository Trust Company 3, 6 (2d ed.), *quoted in* Report 24-25.

[28] *See, e.g., Merrill Lynch Pierce Fenner & Smith, Inc.* v. *North European Oil Royalty Trust*, 490 A.2d 558 (Del. 1985) (holding by Delaware Supreme Court that, before issuing replacement certificates for those lost, stolen, or destroyed, a Delaware corporation may require brokerage houses to supply independent credible evi-

issuer that is responsible for creating additional wealth from the owner's capital investment. By contrast, all of the intermediaries in this case admit that the actual owners of the distributions seized by New York are unknown; these intermediaries are indeed mere conduits. Report 10-11 & nn. 8 & 10, 36-38.[29] To argue, as Delaware and New York do, that the State of a conduit intermediary such as DTC should have the superior equitable claim—as against, for example, the State of a company whose business acumen, technical expertise, efficiency, research and development, and other business activities have generated the profits that happen to get "stuck" at DTC en route to investors in that company—is truly to ignore economic reality.

Delaware's argument becomes most sterile when Delaware disputes the appropriateness of returning unclaimed interest payments on municipal obligations to the State of the municipality, contending that they should be paid

---

dence that they are the beneficial owners of stocks registered in their names).

[29] If an intermediary can establish an ownership interest in a distribution it holds, that distribution obviously will not be unclaimed property. *Amici* assertions that they might actually own some of the property that passes through their hands (*see* SIA *Amici* Br. 21 n.14) are thus beside the point. Moreover, this possibility does not alter the fact that no intermediary was able to assert an ownership interest in any of the distributions that it turned over to New York. *See, e.g.*, Deposition Transcript of John Cirrito, Prudential-Bache Securities, Inc., 225-26 (July 26, 1990) ("Cirrito Dep.").

Delaware and New York do not dispute the fact that intermediary holders of unclaimed securities distributions claim no cognizable ownership interest in the property. Delaware merely provides a lengthy interpretation of the term "asset" (Br. 29-30); it does not contest the Special Master's conclusion that the possession of the unclaimed distributions "does not increase net worth" (*id.* 30 n.34). Although Delaware characterizes the Special Master's use of the term "asset" as a "fairly obvious factual error[]" (*id.* 30), Delaware did not devote even a sentence to this issue in its Comments on the draft Report (Aug. 13, 1991).

instead to a conduit intermediary's State. Delaware states matter-of-factly that it "hardly seems fair to reverse some of a debtor's obligations simply because a breakdown has occurred in the distribution chain." Del. Br. 50. This argument proves too much; every application of the backup rule returns funds to the State of the "debtor," thereby "reversing" (to use Delaware's term) the obligations. The argument also proves too little, because it does not address the central question: whether it is fairer to reward the State of the municipality whose activities and taxpayers have generated the funds or the State of the conduit intermediary that happens to be holding them, "simply because," in Delaware's own words, "a breakdown has occurred in the distribution chain." *Id.*

Fairness plainly favors the State of the municipality in such a contest. So, too, do other fundamental principles of equity. A reward to the State of the municipality results in a wide dispersal of unclaimed distributions among fifty States rather than disproportionately favoring either or both of the two States where the major intermediaries are either located or incorporated. A foundational principle of equity is that "equality is equity," meaning that rights "should be equalized among all the persons entitled to participate." 2 John N. Pomeroy, *Equity Jurisprudence* § 406, at 146 (1941). Since, in the absence of any federal priority rules, all fifty States have a right to enact legislation allowing them to retain unclaimed distributions created by issuers located in their States, *see generally Western Union Tel. Co.* v. *Pennsylvania; Standard Oil Co.* v. *New Jersey*, it follows that equity favors construing the *Texas* v. *New Jersey* rules of priority so as to equalize more closely these rights among all the States, rather than to concentrate the property in Delaware or New York. Such a construction also promotes the Court's objective in *Texas* v. *New Jersey* of promulgating a rule that "in the long run will be the most generally acceptable to all the States." 379 U.S. at 683.

Finally, the Master's fairness analysis also finds support in federal legislation enacted after *Texas* v. *New Jersey*. That legislation, codified in 12 U.S.C. §§ 2501-2503, took up the dissent's criticism in *Pennsylvania* v. *New York*, 407 U.S. at 216-22 (Powell, J., dissenting), that it was unfair to allow Western Union's State of incorporation to take custody under the backup rule even when the identities and addresses of both the senders and intended recipients of unclaimed money orders were unknown. Congress reversed this result in 1974, articulating a federal policy that gives priority in such cases to the fifty States where these transactions originate, *i.e.*, to the States where originators of funds place them in the stream of commerce. *See* 12 U.S.C. § 2501(3).

Delaware dismisses this statute on the ground that it specifically applies only to money orders and traveler's checks. Del. Br. 8. Delaware, however, ignores this Court's tradition of taking guidance in federal common law cases from federal statutes even when they do not speak directly to the question before the Court. The Court does so both to further "the interest in uniformity and because Congress' considered judgment has great force in its own right." *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 624-25 (1978); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313-17 (1981). The judge-made law of custodial priority should therefore not be oblivious to this congressional policy favoring dispersal to the States of the originators.[30]

---

[30] The Delaware-New York suggestion that this Court should be guided by the Uniform Unclaimed Property Act of 1981 in interpreting federal laws and policies articulated by this Court and Congress is erroneous. Del. Br. 10, 32; N.Y. Br. 57-59. This Court specifically noted in *Pennsylvania* v. *New York* that its decree would prevail over any inconsistent provisions in the predecessor Revised Uniform Disposition of Unclaimed Property Act. 407 U.S. at 215 n.8. Moreover, the 1981 Act does not express a uniform state view concerning unclaimed securities distributions. Neither New York nor Delaware (nor more than twenty other States) have adopted the Act's provisions (N.Y. Br. 57 n.47), and there is no evidence

The Delaware-New York approach is inconsistent with all of these equitable considerations. In reality, it would have the Court disinter a philosophy buried in *Texas* v. *New Jersey*: the jurisdiction-based notion that priority should be given to the State where unclaimed funds are fortuitously "situated." [31]

2. *Escheat to the issuer's State is easier to administer*

The Special Master's interpretation of the backup rule is easier to administer because it is more certain. The Delaware-New York approach would require sending "courts (or Special Masters), in subsequent cases, in search of particular state law definitions of 'debtor' and

---

that those States that did adopt its provisions (at least ten of which have since modified their escheat laws) considered intermediary-type securities transactions. For similar reasons, it also would be wrong to use, as Delaware suggests (Br. 10-11), a standard form contract of an unclaimed-property reporting service as a guide to this Court's intent in *Texas* v. *New Jersey*.

[31] Delaware's devotion to jurisdiction-based arguments is perhaps most evident in its "red-herring" contention (Report 70) that the Master's recommendation "appear[s] to go beyond the traditional limits of the Due Process Clause." Del. Br. 35. This is nonsense. As the Special Master's Report properly recognizes (at 68-70), Delaware's argument conflates choice-of-law and jurisdictional issues, applies to the primary rule as well as the backup rule, and ignores the fact that this Court specifically rejected a "minimum contacts" approach in *Texas* v. *New Jersey*, chastising Texas for confusing the issue of court jurisdiction with the issue of escheat priority. 379 U.S. at 678. Moreover, it has long been recognized that a State may bring suit in another State to enforce its federal escheat rights. *See, e.g., State* v. *Amsted Indus.*, 48 N.J. 544, 226 A.2d 715, 718 (1967) (States of creditors' last known addresses "could come to New Jersey where our courts would readily entertain actions by them based on their revenue claims against the defendant"); Brief of the Plaintiff-Intervenor States of Alabama, *et al.* in Opposition to the Motions of New York, *et al.*, at 10 n.14 (Dec. 18, 1990) (listing the statutes of twenty-nine States and the District of Columbia specifically authorizing their chief legal officers to bring actions on behalf of the unclaimed property administrators of other jurisdictions).

'creditor' (which may, in any case, vary somewhat from state to state and context to context)." Report 29-30. This approach, which is recommended by Delaware and New York almost entirely for its supposed simplicity, would in fact increase the complexity of the undertaking.

"Issuer" has a fixed, easily understood meaning. Identifying the "issuer" does not require courts to consult treatises and casebooks or to sift through ambiguous facts. "Debtor," on the other hand, is an often elusive and incomplete term, which requires the application of varying laws to sometimes uncertain facts. Moreover, the suggestion box would always be open: States would presumably remain free to propose differently shaded definitions of the term "debtor," which in turn would create precisely the sort of conflicts problems that this Court sought to avoid in *Texas* v. *New Jersey*, 379 U.S. at 678-80.[32]

The notion that state laws today definitively solve such problems is not correct. To begin with, the two principal sources cited by Delaware and New York to prove uniformity in state law definitions of "debtor" do not even mention the word. U.C.C. § 8-207(1) avoids the term, and merely speaks to the effect to be given to the issuer's or indenture trustee's treatment of the registered owner as the true owner.[33] The section has nothing to do with

---

[32] New York's contention (Br. 65) that individuals would have a difficult time claiming their property from States under a State of the issuer rule has it backwards. A claimant will always know the issuer of the security on which the distribution was paid; however, the claimant is unlikely to know which intermediary in the chain of distribution was holding the payment when it became stuck en route to the claimant.

[33] Prior to due presentment for registration of transfer of a certificated security in registered form, the issuer or indenture trustee may treat the registered owner as the person exclusively entitled to vote, to receive notifications, and otherwise to exercise all the rights and powers of an owner.

U.C.C. § 8-207(1).

the law of escheat. Moreover, like earlier "good faith" cases, this U.C.C. section only provides an affirmative defense to an issuer in a private action and, until that defense is raised in accordance with applicable procedural rules and established by evidence, the corporation remains a "debtor" in every sense of the word.[34] The Official Comment to U.C.C. § 8-207 in fact makes clear that the question of an issuer's "good faith" remains a litigable issue in such cases.[35] Thus, the U.C.C. does not eliminate fact-specific, case-by-case analysis of whether an issuer remains a "debtor" under state law.

As previously noted, neither Delaware nor New York has even adopted the provisions of the other source the two States cite, the Uniform Unclaimed Property Act of 1981. N.Y. Br. 57 n.47. It therefore ill suits them to argue that the Act's definitions should be given determinative effect here. In any case, the 1981 Act could not add content to the operative term "debtor" since it does not use the word. Section 1(8) of the Act defines "holder," and in terms that make being "indebted to another on an obligation" only one of three alternate ways to become a "holder."

As the Unclaimed Property Coordinator for the past nine years at a major brokerage firm testified, a State of the issuer rule "could be readily implemented." [36] Dis-

---

[34] *See, e.g., New England Merchants Nat'l Bank* v. *Old Colony Trust Co.*, 385 Mass. 24, 429 N.E.2d 1143, 1145 (1982).

[35] The Official Comment provides: "The rule of such cases as Turnbull v. Longacre Bank, 249 N.Y. 159, 163 N.E. 135 (1928), which held the issuer liable for paying out dividends to the record holder after the transferee had given notice of the transfer and demanded that a new certificate be issued to him, is left unchanged." (*See* pages 22-23 above for discussion of the "good faith" defense under the common law.)

[36] *See* Affidavit of John Happersett (Dean Witter Reynolds Inc.) at 3, ¶ 6 (Jan. 3, 1991) ("Happersett Affidavit") (Exhibit 22 to the Reply Brief in Support of Motion for Partial Summary Judgment

covery has shown that intermediaries identify each distribution they receive on a particular security by the specific CUSIP number for that security.[37] Because CUSIP numbers "uniquely identify the issuer,"[38] compliance with the Special Master's recommendation would merely require that a firm's computer system link CUSIP numbers with the State of each issuer's principal executive offices. This information is contained in numerous databases commonly used throughout the industry. *See* Report 43 n.41, 66 n.58, B-24 (Metafact G).

Those intermediaries that attack the Special Master's Report in the SIA *Amici* Brief do not dispute the industry's ability to modify whatever software may be used in implementing the rule. Their protests, like New York's, instead amount to little more than the truism that it is simpler to remit unclaimed distributions to one State than to many States. *See* SIA *Amici* Br. 14-16,

---

of the Plaintiff-Intervenor States of Alabama, *et al.* (Jan. 17, 1991) ("Reply Brief of Alabama, *et al.*")). Although Mr. Happersett attested to the ease of implementing a rule that looks to the State of incorporation of the issuer, his testimony applies equally to using the principal executive offices of the issuer to define its location. *See* discussion *infra* at 49-51.

[37] *See* Report B-14 (48); Deposition Transcript of Raymond DeCesare, DTC, 64, 146, 266-67 (May 15-16, 1990) ("DeCesare Dep."); Deposition Transcript of Robert Shearer, Merrill Lynch, Pierce, Fenner & Smith, Inc., 151 (July 19-20, 1990) ("Shearer Dep."); Deposition Transcript of Hugh Scott, Citibank, 151-52 (July 24, 1990) ("Scott Dep.").

[38] The CUSIP Directory (1990) at II (appended as Exhibit 18 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)). "CUSIP" stands for the Committee on Uniform Security Identification Procedures, a committee of the American Bankers Association, which is responsible for assigning a unique CUSIP number to each new security. Contrary to the impression created by the *amici* (SIA *Amici* Br. 17 n.11), it is a "very rare exception" for a security not to have a CUSIP number. Happersett Affidavit at 2, ¶ 4; The CUSIP Directory at V.

19-20; N.Y. Br. 67-69.[39] This fact, however, did not dissuade the Court from promulgating the primary rule of *Texas* v. *New Jersey*, which the Court described as "easy to apply" and which it believed would "simplif[y]" the "administration and application of escheat laws." 379 U.S. at 683, 681.[40] The brokerage firms, banks, and depositories that would be required under the Master's recommendation to report owner-unknown unclaimed distributions to the States of the issuers (rather than to New York or Delaware) have already been reporting under the primary rule, and presumably will continue to report, owner-known unclaimed distributions to all States of the last known addresses of the missing owners.[41]

---

[39] New York's quotation (Br. 68) from the Affidavit of Louis LaRocca (Feb. 12, 1991) is unhelpful. As the Master found (Report 39-40 n.36), Mr. LaRocca failed to provide any basis in his affidavit for concluding that he has personal knowledge sufficient to support his assertions. Moreover, each of the six purported administrative problems with the State of the issuer rule that Mr. LaRocca lists boils down to the same truism—that it is simpler to remit unclaimed distributions to just one State. (*E.g.*, "Each firm would have to become familiar with fifty different laws * * *."; "Each firm would be subject to audit by fifty states * * *." *See* N.Y. Br. 68.)

[40] The State of New Jersey made an almost identical argument, which the Court rejected, in opposition to the Special Master's recommendation in that case. *See* Exceptions of the State of New Jersey to the Master's Report and Supporting Brief at 29 (Feb. 14, 1964). It is, of course, in the nature of the Court's priority rules that entities often must remit property to more than one State. The intermediary *amici* provide no justification for why they should be immune from these rules.

[41] *See, e.g.*, Shearer Dep. 357-58. Indeed, Delaware explains at great length why "the universe of securities and distributions escheatable under the primary rule far exceeds that involved in the present case and escheatable under the backup rule." Del. Br. 12-13 n.17. The concern of *amici* may ultimately have less to do with compliance questions than with their desire to continue to be able to strike deals with New York (or Delaware) so that they can retain

Nothing in the SIA *Amici* Brief undercuts the Master's recommendation.[42]

The Special Master aptly stated that, "in an industry that depends on computerization for its numerous transactions, it is difficult to believe that the administrative differences between [the] two possible approaches to the backup rule should drive the selection of the appropriate rule." Report 40 n.36. In 1991, almost 200 million shares of stock were traded daily on the New York Stock Exchange ("NYSE") alone.[43] The securities industry intermediaries spend billions of dollars annually on computers

---

some of the owner-unknown distributions that they hold. *See* SIA *Amici* Br. 21 n.14.

[42] The entire administrative burden section of the SIA *Amici* Brief (pages 13-20) provides evidentiary support for only one proposition (*id.* 18, concerning information on computer databases). Typical examples of unsupported statements appear at 14 n.9 (comparing the ease of reporting under the primary and backup rules) and at 16 (each financial institution "conceivabl[y]" would have to report unclaimed property "continuously"). The *amici* also mischaracterize the Special Master's findings. The *amici* "question" the Master's supposed assumption that "each issue of securities is the subject of a separate suspense account." Br. 15 n.10. The Master's recommendation in no way relies on whether the unclaimed distributions are placed in one bank account or in many bank accounts. What matters is that each distribution, and hence the issuer, is identifiable by the unique CUSIP number of its underlying security.

The *amici* had every opportunity, moreover, to comment and develop a record on the feasibility of a State of the issuer rule before the Special Master. The *amici* were aware of this case from its outset; the Securities Industry Association filed an *amicus* brief on May 9, 1988; and counsel of record for SIA defended a deposition of one of the brokerage firms, while counsel for DTC on the SIA *Amici* Brief defended the deposition of DTC. Indeed, *amici*'s counsel of record and DTC's outside counsel were both on the Special Master's service list and were sent all communications by the Special Master, and all briefs of the parties, before the Master distributed his draft Report.

[43] *See* NYSE, *Fact Book For The Year 1991* 12 (1992).

in order to process successfully those transactions and to service and maintain the accounts of their millions of customers.[44] In addition, a number of unclaimed-property reporting services currently provide computerized assistance to aid companies with their state filings.[45] An industry better equipped to comply with the recommended rule can scarcely be imagined.

II. THE SPECIAL MASTER PROPERLY REJECTED NEW YORK'S PROPOSED DISTORTION OF THE PRIMARY RULE

While the "intermediary" theory of the backup rule asserted by Delaware and New York (but rejected by the Special Master) would permit New York to retain the unclaimed distributions it has seized from DTC and New York banks, that theory would not permit New York to retain unclaimed distributions from brokerage firms, because most of them are incorporated in Delaware. New

---

[44] *See* "High Hopes, High Costs for Wall Street's High Technology," *The Economist* (Feb. 2, 1991) ("America's securities firms will spend $7.5 billion this year on technology"); U.S. Congress, Office of Technology Assessment, *Electronic Bulls and Bears: U.S. Securities Markets and Information Technology* 139 (1990) (brokerage firm annual expenditures on computers used for "information services is forecast to increase to about $3 billion by 1991"; "[t]here are thousands of commercial software packages available to brokers"). *See also* Happersett Affidavit at 4, ¶ 7 (Dean Witter Reynolds uses its "sophisticated computerized data-management capabilities" to process "tens of thousands of trades daily and keep[] track of the ever-changing portfolios of its nearly 2 million customers").

[45] All of these services—such as The Prudential Unclaimed Equities Division (a Prudential Insurance company), DISC APECS (a NYNEX company), the Clearinghouse Reporting Service, and the Unclaimed Property Clearinghouse—use sophisticated computer technology. *See* The Prudential Unclaimed Equities Division, *Introduction to Prudential's Abandoned Property Service*; "DiscAPECS Eases Compliance Woes," *Insurance Software Review* (April/May 1990); Clearinghouse Reporting Service, *Unclaimed Property Reporting Manual* 4, 9; Unclaimed Property Clearinghouse, *Voluntary Compliance Manual* (1992).

York has therefore conveniently developed a different theory, specific to brokerage firms. The Special Master, in rejecting this theory, characterized it as inconsistent with controlling precedent (Report 64), based upon "meretricious" factual assertions (*id.* 62 n.54), yielding "perverse[]" results (*id.* 65), and built upon "presumption on presumption with no legal or practical authority for either" (*id.* 67). This New York theory is also inconsistent with New York's other theory concerning DTC and banks, and is disputed by every other State including plaintiff Delaware.

The centerpiece of New York's brokerage firm theory is that, while unclaimed distributions that become "stuck" at DTC and banks are owner-*unknown*, the distributions that become "stuck" at brokerage firms are owner-*known* and are therefore subject to escheat under *Texas* v. *New Jersey*'s primary rule rather than its backup rule. The Special Master correctly rejected this contention as contradicting "the unanimous conclusion of the industry entities and personnel from whom discovery was taken that the unclaimed funds at issue here are net of all successful efforts to identify appropriate recipients and are truly owner-unknown." Report 61.[46]

New York's assertion that broker-held distributions are owner-known is a *post hoc* effort to justify the State's taking of unclaimed distributions pursuant to a statute that conflicts with the rules of priority established in *Texas* v. *New Jersey*. New York has taken custody of such distributions under Article V-A of its Abandoned Property Law ("APL"), enacted in 1952, which authorizes New York to seize unclaimed distributions from brokerage firms solely because that property was "re-

---

[46] *See also* Shearer Dep. 213-15 (Merrill Lynch's records do not contain the identity or address of the owners of the unclaimed distributions), *id.* 348-49; Deposition Transcript of Joseph Principe, John Hancock Clearing Corp. (formerly of Tucker Anthony Inc.), 102-03, 222 (July 25, 1990) ("Principe Dep."); Cirrito Dep. 93, 128.

ceived in" New York, irrespective of the last known addresses of the owners (or the domiciles of the "debtors"). APL §§ 511(1), 511 (1-a). New York's current theory that it is entitled to this property under the primary rule as the domiciliary State of the persons to whom the distributions are owed is thus a recent—and, we show below, meritless—invention.[47]

A. All Evidence Demonstrates That The Unclaimed Distributions Held By Brokerage Firms Are Owner-Unknown

Although New York now asserts that the unclaimed distributions held by brokers are owner-known, prior to this litigation New York publicly acknowledged that these distributions are in fact owner-unknown. In 1980, for example, New York instituted proceedings against the brokerage firm of Paine Webber, after Paine Webber had refused to turn its unclaimed distributions over to New York.[48] New York stipulated in that proceeding that

> [t]he books and records maintained by Paine Webber do not reveal the identity of, or any last known addresses for, any persons to whom [unclaimed] dividends, interest or cash may be owed, nor do such books and records reveal whether Paine Webber is the owner of such property.[49]

---

[47] Nothing more clearly demonstrates the *post hoc* nature of New York's primary rule theory than the fact that it now requests discovery in order to prove that it was entitled to the unclaimed distributions that it seized from brokerage firms in years past. *See* N.Y. Br. 81.

[48] *See In The Matter Of The Application Of The Office Of The State Comptroller, Petitioner, For A Certification That Certain Property Held By Paine Webber Jackson & Curtis, Incorporated, Respondent, Be Deemed Abandoned Property* (Office of the State Comptroller) (*"Paine Webber"*).

[49] Stipulation of Agreed Facts ¶ 7, *Paine Webber* (appended as Exhibit 8 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)).

Moreover, New York's argument flies in the face of New York's own characterization of such property in the same fashion in its 1988 edition of its *Handbook for Reporters of Unclaimed Funds*—prepared by the New York Office of Unclaimed Funds to "inform organizations of their responsibilities under the Abandoned Property Law." The *Handbook* states that "[u]nclaimed amounts received in this state and securities held in this state for unknown parties or addressee unknown are subject to Article V-A of the New York State Abandoned Property Law." [50]

The record, in any event, conclusively demonstrates that this property is owner-unknown. As New York acknowledges,[51] the brokerage firms uniformly testified that they do not know the owners of the distributions that they remit to New York. The sole "evidence" on which New York relies to counter that testimony is the affidavit of its own Director of Audits, Robert Griffin ("Griffin Affidavit").[52] That affidavit, however, is irrelevant, for all that it purports to show is that through monumental effort and expense (which even New York concedes would

---

[50] The quoted passages appeared at pages 1 and 40, respectively, of the *Handbook* (appended as Exhibit 10 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)). Language to the same effect appeared in the 1983 edition of New York's *Handbook* (appended as Exhibit C to Delaware's Complaint). Thus, regarding APL § 511, the 1983 *Handbook* stated that

> unpaid amounts in category (a) often occur when the broker or dealer ceases to hold the security at the time of receipt of the dividend or bond interest, the security having already been traded, and *the persons or customers entitled to such payment cannot be identified (unknown).*

Complaint of Delaware, Ex. C at 71, ¶ 1 (Feb. 8, 1988) (emphasis added).

[51] Brief in Opposition to Motions of the Plaintiff-Intervenor States at 59 (Dec. 18, 1990); N.Y. Br. 33.

[52] New York appended this affidavit as Exhibit A to its Brief in Opposition to [Delaware's] Motion for Leave to File Complaint (May 9, 1988) ("N.Y. Brief in Opposition").

be infeasible (N.Y. Br. 80)), a so-called "debtor broker" could, but only sometimes (*see* Griffin Affidavit ¶ 2), identify the broker (the so-called "creditor broker") to which it delivered a particular securities certificate that was not subsequently reregistered out of the "debtor broker's" name and that allegedly resulted in a distribution overage through the phenomenon of "nominee float." [53] Even if New York could accomplish this unaccomplishable task, the fruits of its efforts would reveal nothing about who actually owns that unclaimed distribution.[54]

The person or entity that is owed a distribution is the beneficial owner, on the record date, of the security on which the distribution is paid. New York has never claimed that "creditor brokers" own or even hold the relevant certificates over the record date. Indeed, New York has conceded that it has no way of knowing whether the first recipient of the certificate—the only party New York says it can identify (albeit theoretically)— actually held that certificate over the record date or is the owner of

---

[53] Griffin Affidavit ¶2; N.Y. Brief in Opposition at 6-7 (May 9, 1988). "Nominee float" occurs when a broker (Broker A) delivers to another party a certificate that is still registered in Broker A's street name. If the recipient of the certificate (or the person to whom the recipient subsequently transfers the certificate) does not reregister the certificate out of Broker A's name by the record date for a distribution, Broker A will receive the distribution even though it no longer holds the security and does not anticipate receiving the distribution. New York has labeled Broker A the "debtor broker," and dubbed the recipient of the certificate from Broker A, when it is a broker, the "creditor broker."

[54] New York's request that it be allowed to use "statistical sampling" (Br. 80) to determine "creditor brokers' " so-called "trading addresses" is also unavailing because, as we explain below, and as the Master recognized (Report 61-67), the identities of the "creditor brokers" are irrelevant and these addresses are meaningless. Moreover, the Special Master correctly rejected a "sampling" approach as inconsistent with this Court's escheat decisions. *Id.* 59 n.50.

any distribution paid on the certificate.[55] Identifying the first recipient broker (the so-called "creditor broker") in what may be a series of subsequent exchanges of the certificate therefore does not establish that any particular distribution is owner-known.

This fact is underscored by New York's admission that unclaimed distributions caused by "float" and held by DTC and custodian banks are owner-unknown. N.Y. Br. 18, 81. DTC and custodian banks, like brokers, know to whom they have delivered out certificates registered in their names (DeCesare Dep. 351; Scott Dep. 70-72), but they do not know the owners of the certificates as of any subsequent record date for a distribution (DeCesare Dep. 116-18; Scott Dep. 207-08). Consequently, neither the intermediary brokers, banks, nor DTC can identify the actual owners of the distributions.

New York responds by attacking the Special Master's conclusion that the "creditor" of an unclaimed securities distribution is its ultimate intended beneficiary. N.Y. Br. 75-77. According to New York, "creditor" in the case of distributions held by brokers means the "apparent owner" of the property, which New York defines as the next intermediary in the chain of distribution (*i.e.*, the only entity that New York claims can be identified, at least theoretically). Yet, just as New York concedes that the first recipients of certificates from DTC and custodian banks are not the "apparent owners"—because they do not necessarily hold the certificates over the record dates

---

[55] In New York's own words:

> The broker to whom delivery was initially made [the so-called "creditor broker"] may have a pre-record date sale in the same security and use the certificate it received from the debtor broker, without re-registering it, to effect delivery to the contraparty to its sale.

Renewed Motion for Judgment on the Pleadings Against the Plaintiff-Intervenor States at 47 n.85 (Oct. 30, 1990) (deposition references omitted); *see also* Shearer Dep. 103 ("the person who [Merrill Lynch] first delivered [the certificates] to could transfer and deliver them down a chain of other people").

—identifying the first recipient of a certificate from a brokerage firm likewise fails to establish the necessary ownership interest.[56]

Furthermore, New York's assertion that broker-held unclaimed distributions are owed to "creditor brokers" is inconsistent with how the SEC requires that such distributions be treated. In 1972, the SEC promulgated Rule 15c3-3, which requires brokerage firms to maintain a separate bank account, called the Special Reserve Bank Account for the Exclusive Benefit of Customers ("Reserve Account"). *See* 17 C.F.R. § 240.15c3-3(e)(1).[57] This rule demands that, among other funds, unclaimed dividends and interest held by brokerage firms be credited to this special account.[58] John Cirrito, Senior Vice President of

---

[56] New York further asserts that the Special Master "interprets the primary rule in such a way that it cannot be utilized." N.Y. Br. 78. This is plainly not the case. For example, the brokerage firms testified that when they send dividend checks to a customer and those checks are not received or cashed by the customer, the monies are placed in a dormant customer account and eventually turned over to the State of the customer's last known address under the primary rule. *See, e.g.*, Shearer Dep. 357-58; *see also* Del. Br. 12-13 n.17 (discussing Delaware's contention that far more distributions are escheatable under the primary rule). The fact that the Special Master's recommendation would result in the primary rule's not being applied to the distributions at issue in this case merely reflects the fact that this case involves only those distributions that are owner-unknown.

[57] "Customer" is defined in the rule to exclude brokers trading on their own behalf. 17 C.F.R. § 240.15c3-3(a)(1).

[58] Rule 15c3-3 contains a formula that delineates the various types of funds that must be credited to the Reserve Account. 17 C.F.R. § 240.15c3-3a, Exhibit A. Item 8 of that formula credits into the Account the "[m]arket value of * * * credits * * * in all suspense accounts over 30 calendar days." Through communications with the SEC, the NYSE confirmed that unclaimed dividends and interest are "suspense accounts" to be credited to the Reserve Account pursuant to Item 8, and directed its member brokerage firms accordingly. *See* NYSE, ***Interpretation Handbook***, Vol. 1 at 640,

Prudential-Bache, confirmed that Prudential-Bache places unclaimed distributions in its Reserve Account for customers pursuant to Rule 15c3-3, and that these monies may be owed not only to Prudential-Bache's own customers but also to customers of other firms. Cirrito Dep. 78-80, 153-55.[59]

B. New York's Assertion Regarding The Cause Of Overages At Brokerage Firms Is Unsupported By The Record

Even if the identities and addresses of so-called "creditor brokers" were relevant—which they are not—New York's primary rule theory would still fail because it depends upon the unwarranted presumption that unclaimed dis-

---

¶ 3 (1986) (appended as Exhibit 23 to Reply Brief of Alabama, *et al.* (Jan. 17, 1991)).

Delaware's discussion of Rule 15c3-3 (Br. 44-45) misses the point. We do not rely upon this rule with respect to Delaware's theory, and no one contends that brokers holding unclaimed distributions may not make certain uses of those monies prior to escheat. Rule 15c3-3 is relevant, however, insofar as it refutes New York's assertion that those distributions are not customer monies. Delaware does not dispute that the Rule so treats those distributions (and in fact agrees that they are owner-*unknown*).

[59] Since the addresses of the so-called "creditor brokers" are irrelevant, the Master's denial of New York's request for additional discovery on the issue—"to demonstrate that it is the State of last known address of virtually all of the creditor brokers on the books and records of New York debtor brokers" (N.Y. Br. 81)—was also clearly appropriate. Moreover, New York was present at each of the brokerage firm depositions, yet never asked a single question to challenge, explore, or impeach the testimony that the property is owner-unknown. Indeed, New York did not pose a single question pertaining to the brokers' recordkeeping practices in this regard. Nor did New York ask whether any type of examination of those records would permit identification of the so-called "creditor brokers." For example, New York did not challenge or probe the statement of John Cirrito that "any kind of research" into overpayments "would really be fruitless." Cirrito Dep. 73. At two of the three brokerage firm depositions, New York in fact asked no questions at all.

tributions held by brokerage firms arise only from "nominee float," rather than from other causes, such as errors, as to which not even New York contends it can identify a "creditor broker." N.Y. Br. 19-20, 30, 77. The unanimous testimony of the brokerage firm representatives contradicts this presumption. These representatives testified that (1) errors (as well as out-of-balance conditions and missed transfers) are among the causes of unclaimed distributions that they hold,[60] and (2) brokers have no idea of the particular causes of all or any portion of the unclaimed distributions that they turn over to New York.[61] An overage is thus a gross, indivisible whole, whose component parts remain unknown.

New York responds by claiming that overages caused by errors and out-of-balance conditions are resolved, and therefore do not result in unclaimed distributions. N.Y. Br. 29, 30. New York, however, provides no record citation for most of its assertions; for others, it relies on testimony that in no way supports them. New York particularly relies on the testimony of Robert Shearer of Merrill Lynch, but Mr. Shearer never testified that overages caused by factors other than "nominee float" are resolved prior to escheat. To the contrary, he testified that Merrill Lynch "can't determine whether any portion of" the unclaimed distributions that the firm turns over to New York "was the result of an error or the result of physical certificates having been withdrawn from Merrill Lynch but still registered to Merrill Lynch ["nominee float"]." Shearer Dep. 198.[62] New York's other at-

---

[60] Shearer Dep. 193-94; Cirrito Dep. 224; Principe Dep. 97-98.

[61] Shearer Dep. 195, 197-98; Cirrito Dep. 224-25; Principe Dep. 96, 101.

[62] This is typical of New York's playing fast and loose with the record. New York erroneously accuses the Special Master of having misconstrued the causes of unclaimed distributions at the brokerage firm level (*e.g.*, Br. 19-20) when, as shown above, it is New York's factual assertions that are unsupported and indeed

tempts to show that unclaimed distributions held by brokerage firms are almost never caused by error or are not owed to the customers of brokerage firms amount to sheer speculation.[63]

Finally, New York's assertion (Br. 21, 79 n.58) that 97.4 percent of the claims on escheated distributions that New York paid from 1985 through 1989 have been paid

---

contradicted by the record. New York's treatment of the causes of unclaimed distributions at the DTC and custodian bank levels suffers from the same infirmities. New York criticizes (*id.* 24 n.25, 27) the Special Master's finding that "float" is only one of several causes of such unclaimed property, notwithstanding the fact that those intermediaries testified that there are many causes of unclaimed distributions besides "float" (DeCesare Dep. 90-91, 120-21, 138; Scott Dep. 166-67, 174-75), and that the intermediaries do not know the causes of all or any portion of a particular distribution that they turn over to New York (DeCesare Dep. 119, 131).

[63] New York argues, for example, that customers "usually" receive the distributions to which they are entitled from their brokers. Responses of the State of New York to the First Set of Interrogatories Propounded by the States of Alabama, *et al.*, No. 12 (April 27, 1990) ("N.Y. Resp."); N.Y. Br. 79 n.58. Even if this were the case, it would not explain the cause of unclaimed distributions held by brokerage firms. "The percentage of funds that appears to become 'lost' in the system has been estimated by some of the parties as approximately 0.02%, or two ten-thousandths, of the entire amount distributed." Report 10 n.9. New York offers no evidence that any particular instance in which funds become stuck at a brokerage firm fails to correspond to one of the instances in which a customer is not paid. *See, e.g.*, Affidavit of William H. Mills, Sr. ("Mills Affidavit") (appended as Exhibit 5 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)). Mr. Mills was a customer of Merrill Lynch, and dividends on the securities that he beneficially owned were supposed to be credited by the firm to his account. Nevertheless, Merrill Lynch for several years failed to credit his account with certain dividends paid on his stock and turned the dividends over to New York as unclaimed property. Mr. Mills's claim file was produced by New York in discovery as "representative." *See* Letter from O. Peter Sherwood to David A. Talbot, Jr. (June 6, 1990) (appended as Exhibit 16 to Brief in Support of Alabama, *et al.* (Oct. 30, 1990)).

to brokers and financial institutions, such as DTC and banks, proves nothing. Brokerage firms frequently make claims on behalf of their customers,[64] and an intermediary's claim does not reflect whether it was filed on behalf of a customer.[65] Intermediaries also routinely monitor and research their underpayments and pursue claims to recover distributions they did not receive.[66] By contrast, a customer may never know that a dividend was declared (*see* Shearer Dep. 113) or that it erroneously was not credited to his or her account, or may not learn of what actually happened until years have passed and the property has been escheated.[67]

C. "Trading Address" Is A Contrived Term, Created By New York For Purposes Of This Litigation

New York's entire primary rule argument devolves to a request that this Court adopt a series of presumptions that, when linked together, purport to show that unclaimed distributions held by brokerage firms are owed to other brokerage firms, most of which have "trading addresses" in New York. Apart from the invalidity of the other presumptions upon which New York's theory rests, the concept of "trading addresses" is itself an artifice "created out of whole cloth by New York, to favor itself in the instant case—or, perhaps more accurately, to rationalize post-hoc what it has been doing for many years." Report 67 n.59.

The Special Master correctly found that "trading address" "is not a concept used in securities law, the Uniform Commercial Code, debtor-creditor law, or the law of personal jurisdiction, venue, or subject matter jurisdiction of the courts." *Id.* New York now asserts (Br.

---

[64] Principe Dep. 106.

[65] Shearer Dep. 225-26, 276; Cirrito Dep. 237.

[66] Principe Dep. 113; Cirrito Dep. 72.

[67] *See, e.g.*, Mills Affidavit.

80 n.59) that "trading address" is the "official address" used by the National Securities Clearing Corporation ("NSCC"); initially, New York argued that "trading address" could be found in the Securities Industry Association's *Securities Industry Yearbook 1987-88* and *The E-Z Telephone Directory of Brokers and Banks* (1986).[68] This moving-target definition of "trading address" is typical of the way New York has tried to defend the indefensible. There is no evidence that the NSCC even denotes an "official address," much less that the data of such a private organization should be entitled to legal significance.

Indeed, even if New York could unravel the identity of the owners of the unclaimed distributions held by brokerage firms, New York would be obligated to forward the property to those owners and there would be no unclaimed distributions for any State to take. In reality, of course, the property is owner-unknown. As stated by John Cirrito, Senior Vice President of Prudential-Bache, "[t]he problem with overages is that you don't have—you don't agree or don't know to whom the monies are due. If you did, you would pay them." Cirrito Dep. 128.

III. THE COURT SHOULD ADOPT THE SPECIAL MASTER'S SEPARATE RECOMMENDATION THAT FOR PURPOSES OF THE BACKUP RULE THE LOCATION OF AN ISSUER SHOULD BE DEFINED AS THE STATE IN WHICH IT MAINTAINS ITS PRINCIPAL EXECUTIVE OFFICES

The Special Master has separately recommended "that the location for purposes of the backup rule be determined by looking to where the issuer's principal executive offices are located," rather than to its place of incorporation. Report 56. The Report concludes that the administrative concerns that constrained the Court to reject a subjective "principal place of business" approach in *Texas*

---

[68] *See* N.Y. Brief in Opposition at 8 n.9 (May 9, 1988).

v. *New Jersey* do not apply today to an objective "principal executive offices" standard. *Id.* 41-50. The Master further found that today "it would be quite unfair" to allocate disproportionately the huge amount of unclaimed securities distributions to one State, "when the principal executive office test could provide a much superior allocation among the jurisdictions with roughly comparable ease and certainty." *Id.* 47.

The technological advances of the past twenty-seven years, which make readily available through computer databases the "principal executive offices" information provided on required SEC filings, and the dramatic increase in unclaimed securities distributions subject to the backup rule, both support the conclusion that today, as a definition of an issuer's location, "principal executive offices" "is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." 379 U.S. at 683.

All fifty States are before the Court, and only Delaware, the State of incorporation of more than 40 percent of the companies listed on the New York Stock Exchange (Report 47 n.43), opposes this aspect of the Master's recommendation. Delaware argues that (1) it is not necessarily more equitable to prefer the State where an issuer maintains its principal executive offices over the State of its incorporation; (2) a "principal executive offices" definition would be administratively burdensome to implement; and (3) the principle of *stare decisis* requires that the old proxy for an issuer's location be maintained, even if the foundation for it no longer exists. Del. Br. 52-76. We discuss each of these objections in turn.

A. It Is Far More Equitable To Define The Location Of An Issuer As The State In Which It Maintains Its Principal Executive Offices

The Special Master's analysis of the equities is rooted in this Court's own description of State of incorporation as "a minor factor" to be considered, and in the Court's

recognition that, where feasible, it is most equitable to reward the State that, because it is where the issuer maintains its main offices, "is probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Texas* v. *New Jersey*, 379 U.S. at 680. Delaware ignores these underpinnings of the Special Master's reasoning, and goes so far as to accuse the Master of recommending a Marxist redistribution of income. Del. Br. 68.

The demographics of Delaware itself, however, well illustrate the soundness of this Court's view of a company's State of incorporation as a minor factor in a fairness analysis. Delaware is the State of incorporation of more than 40 percent of NYSE-listed companies, but only a small fraction of the business activities in this country—the activities generating the unclaimed distributions—occurs in Delaware. Report 47 n.43. Continued application of the old proxy for an issuer's location would thus yield vast quantities of unclaimed distributions to a single State in which only limited business activities take place.[69]

Delaware says it is nonetheless entitled to custody of the unclaimed distributions as a reward for the "great effort" and "resources" it devotes to the interests of Delaware-incorporated businesses. *See* Del. Br. 68-69 (discussing, *inter alia*, the time spent by Delaware public servants scrutinizing the State's corporate laws and handling trials involving Delaware-incorporated companies). These costs, of course, are dwarfed by the massive taxes Delaware recovers from these companies annually;[70] and

---

[69] Whether certain commentators believe that Delaware's corporate laws assist in maximizing shareholders' revenue (Del. Br. 62-64) does not change this fact.

[70] In 1990, Delaware expected to receive $201 million in franchise taxes alone. 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations and Business Organizations* F-2

"tax revenues are only the tip of the iceberg," for they do not include the substantial additional income Delaware residents earn from servicing Delaware corporations.[71]

Delaware does not deny that defining the location of an issuer as the State in which it maintains its principal executive offices rather than its State of incorporation is more likely to result in a return of funds to the jurisdictions where those funds were created. Delaware's complaint rather appears to be that "principal executive offices" is not as equitable a definition as "principal place of business." *See* Del. Br. 64-65. This argument merely criticizes the Special Master for not having recommended a definition that Delaware could have attacked with some merit[72]—a definition Delaware itself describes as "unadministrable." *Id.* 65. The Master recognized, moreover, that a company's principal executive offices will not always be the same as its principal place of business, but nonetheless "will, in almost every case, involve substantial operations (in the sense of executive decisionmaking, which is of critical importance to the day-to-day life of a business)," and, "usually, albeit not always, will be located at a firm's principal place of business, particularly as one focuses on relatively small companies." Report 46. "This is more than can be said about the location of incorporation as compared to the location of a business' operations." *Id.*

(2d ed. 1991 Supp.); *see also* Roberta Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J.L. Econ. & Organization 225, 240-42 (Fall 1985) (*cited in* Del. Br. 62-63) (showing that Delaware's franchise revenue averaged in excess of 15 percent of its total revenue from 1960 to 1981, and that this income is considerably greater than Delaware's costs in chartering corporations).

[71] Roberta Romano, *supra* note 70, at 240-41.

[72] This Court eschewed a "principal place of business" approach in *Texas* v. *New Jersey*, despite its equitable advantages, because, unlike a "principal executive offices" approach, it is inherently subjective and would have generated a multitude of fact-specific, case-by-case analyses. 379 U.S. at 680.

Finally, Delaware argues that companies may choose the location of their principal executive offices for whimsical reasons. Del. Br. 66-67. This contention is grossly exaggerated,[73] but in any case beside the point. This Court's fairness criteria focus on the location of the companies that generate the unclaimed distributions, not on the reasons underlying those companies' decisions to locate there.

B. A "Principal Executive Offices" Definition Can Be Readily Implemented

We have previously explained that it would be administratively simple for an intermediary to identify the States of issuers. *See supra* pp. 30-34. The Special Master correctly concluded that there would be no substantial difference in this regard whether the location of the issuer is defined as the State of its principal executive offices or of its incorporation. Report 46. The Special Master crafted his recommendation to ensure its implementation with little difficulty by grounding it in public companies' own designations of their principal executive offices in public filings with the SEC (*id.* 42-49), thereby creating as objective a standard as that of State of incorporation.

The cover pages of numerous registration statements and reporting forms that registered issuers must file with the SEC under the Securities Act of 1933 and the Securities Exchange Act of 1934 require each filing company to state the address of its "principal executive offices." *See* Report B-24 (Metafact H). Under the Master's recommendation, the location of the principal executive offices

---

[73] One of the articles Delaware itself cites for this proposition describes numerous economic factors justifying relocation decisions—including the availability of skilled labor, real estate and rental costs, operating costs, taxes, environmental regulations, corporate identity, the ability to meet strategic goals, and proximity to large metropolitan centers. *See* W. John Moore, "Corporate Kidnapping," 19 *National Law Journal* 1518, 1519 (June 13, 1987) (*cited in* Del. Br. 67).

identified by each company on these forms is binding for purposes of implementing the backup rule.[74] Since holders of unclaimed property can now access this information in the same manner as they would access issuers' States of incorporation, *i.e.*, through computer databases used throughout the securities industry,[75] holders can comply easily with the Master's recommendation.

Delaware devotes much of its self-serving critique of the feasibility of the Master's proposal to an analysis of how filings under the U.C.C. operate. Del. Br. 56-58. This discussion is irrelevant, however, to the ease with which a rule that utilizes one standard source—SEC filings—can be implemented. Moreover, the supposed practical problems that Delaware suggests might arise under the Master's recommendations do not withstand scrutiny. Delaware asserts (Br. 59) that in a few instances different computer databases list different principal executive offices for a company, *i.e.*, where one database has not been updated as quickly as another.[76]

---

[74] No one disputes that the location of the principal executive offices of every issuer is available. Indeed, even when an issuer is exempt from filing under the 1933 and 1934 Acts, a standard source for determining its principal executive offices still exists. Pursuant to 17 C.F.R. § 240.15c2-11 and Schedule H of the National Association of Securities Dealers ("NASD") By-Laws, NASD requires brokers and dealers to file NASD Form 211 with respect to those categories of issuers. As with 1933 Act registration statements and 1934 Act reports, NASD Form 211 requires the identification of the address of the issuer's "principal executive offices."

[75] *See* Report 66 n.58 (citing Brief in Support of Alabama, *et al.* Exs. 19 & 20; Principe Dep. 69-72); *see also* Shearer Dep. 375-78. These databases identify both the State of incorporation and the principal executive offices of each company as reflected in its SEC filings. *See, e.g.*, Dialog Information Retrieval Service, *Disclosure Database* 1 (1989), and Dialog Information Retrieval Service, *Standard & Poor's Corporate Descriptions* 1 (1988) (sources of information identified as documents filed with the SEC).

[76] The Master's proposed decree refers with precision to the State of the issuer's principal executive offices as identified by the

If a holder relies in good faith upon information contained in a database when remitting unclaimed property to a State, however, the holder is relieved of liability to any other State that subsequently believes that it should have received the property.[77] Moreover, no litigable issue between States would be created in these rare instances since it is the information on the SEC forms that is determinative.[78]

C. Adopting The Master's Proposed Definition Would Be An Appropriate Exercise Of This Court's Power

Delaware maintains that modifying the backup rule's locational definition would violate the principle of *stare decisis*. "It has been said so often as to have become axio-

---

issuer "on the last report filed in the twelve-month period immediately prior to the distribution in question." Report A-4 (Proposed Decree, ¶ 6). This location obviously does not change. The SIA *Amici* raise the specter (Br. 17) of "issuers list[ing] more than one principal executive office." This is a non-issue. Only four of the approximately 1,700 NYSE companies listed more than one principal executive office on recent quarterly Forms 10-Q filed by them with the SEC, one more than the three NYSE companies that identified themselves as being incorporated in more than one State. Report 47-48.

[77] Every state unclaimed property statute relieves holders of unclaimed property from all liability for any claim made for the property, once the property is delivered to the State. *See, e.g.*, Ala. Code § 35-12-34 (1975); Del. Code Ann. tit. 12, § 1203(c) (1987).

[78] Delaware's complaint (Br. 22 & n.32) that the Special Master erroneously rejected its request for discovery with respect to the modification of the locational definition is baseless. The Master permitted two additional rounds of briefing on this issue (as well as on the issue of retroactivity) in response to Delaware's request. Delaware's opening brief contained twenty-one exhibits and an affidavit to which six more exhibits (totalling in excess of 120 pages) were appended. These materials did not create any justification for additional discovery, which the Master correctly concluded would have been "pointless." Discovery Order No. 15 at 1 (Jan. 28, 1992).

matic," however, "that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions." *Funk* v. *United States*, 290 U.S. 371, 383 (1933); *see, e.g.*, *Trammel* v. *United States*, 445 U.S. 40, 47-53 (1980) (modifying common law rule concerning adverse spousal testimony). Because of the availability today of computer databases reflecting the information provided on standardized SEC forms, "principal executive offices" now possesses the same "virtues of clarity and ease of application" that led this Court in *Texas* v. *New Jersey*, 379 U.S. at 680, to adopt State of incorporation as a proxy for location in lieu of the unclear and subjective "principal place of business." Since the "State of incorporation" proxy now operates in "quite unfair" ways (Report 47) as compared to a "principal executive offices" definition, refining the Court's common law escheat rules to take these developments into account would plainly be an appropriate exercise of this Court's power.[79]

Delaware's argument that reliance interests would be upset is meritless. Delaware can point to no private reliance interests that would be affected, and cites only one public interest—the fact that a change in the locational proxy might require States to amend their statutes. Del. Br. 73-74. Delaware, the only State that opposes the modification, is in no position to assert this "reliance interest" on behalf of the other forty-nine States. To the extent that any States might have to amend their unclaimed property statutes, this is a consequence that those States, through the position they have taken in this case, are ob-

---

[79] As this Court recognized in *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 174-75 (1989), *stare decisis* does not protect a rule that has "become[] outdated and after being 'tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare.'" (quoting *Runyon* v. *McCrary*, 427 U.S. 160, 191 (1976), quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 149 (1921)).

viously prepared to accept.[80] The doctrine of *stare decisis*, in short, does not straight-jacket this Court from making a "minor change" (Report 50) in the backup rule to ensure that the rule today furthers the policy objectives of *Texas* v. *New Jersey*.[81]

IV. THE SPECIAL MASTER'S RECOMMENDATIONS SHOULD BE APPLIED TO ALL FUNDS WRONGFULLY SEIZED BY NEW YORK

The Special Master further recommends that the decision in this case apply to the full complement of unclaimed distributions wrongfully seized by New York, *i.e.*, to the distributions New York has taken from brokerage firms (the seizure of which New York now defends under the primary rule) and from DTC and banks (now defended under the backup rule). Even if applying the present decision to these funds, all of which New York

---

[80] Delaware raises a concern as to whether the modified locational definition would apply to property other than securities distributions. Del. Br. 60-61. If this definition did so apply, it would not create any difficulties. Delaware provides no examples of owner-unknown property, other than securities distributions, that is held by an intermediary where the originator is known. In situations where the holder is also the originator or is the only known party to the transaction (as in *Pennsylvania* v. *New York*), implementation of a "principal executive offices" definition would be simple. The State of the holder would be entitled to custody of the property, and the holder would surely know the State of its own principal executive offices.

[81] The fact that Congress has not made such a modification in the case of securities distributions does not alter this conclusion. In *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970), this Court reaffirmed the appropriateness of modifying its common law rules despite congressional inaction: "To conclude that Congress, by not legislating on this subject, has in effect foreclosed, by negative legislation as it were, reconsideration of prior judicial doctrine would be to disregard the fact that 'Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law.'" (Citation omitted.) Moreover, the statute that Congress has enacted affecting the States' powers

concedes it currently holds only as custodian,[82] were deemed to raise a retroactivity question, the accepted principles concerning retroactive application would still preclude Delaware's and New York's objections to the Master's recommendation.[83]

The two dispositive principles are that (1) if the court decision is not fundamentally law-changing (either as a matter of "first impression" or as a break from "clear past precedent"), it applies retroactively, *Ashland Oil, Inc.* v. *Caryl*, 110 S. Ct. 3202, 3204-05 (1990) (per curiam) (applying the first (threshold) prong of the test in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971)); *American Trucking Ass'ns* v. *Smith*, 496 U.S. 167, 196 (1990), and (2) even if the decision is fundamentally law-changing, the party seeking to defeat retroactivity must demonstrate that it relied to its detriment on the earlier law, *Chevron Oil*, 404 U.S. at 106; *Ashland Oil*, 110 S. Ct. at 3204-05.

Applying this Court's federal escheat rules to the property New York has seized from brokerage firms is so obviously appropriate that it merits little discussion. The Special Master's rejection of New York's contrived primary rule theory obviously overrules no past precedent; it is in fact compelled by the controlling case law. *See, e.g.*, Report 64, 65, 67. That ends the matter. New York, however, does not lose out entirely; it will be able to re-

---

in this regard, 12 U.S.C. §§ 2501-2503, rejects using a company's State of incorporation as a proxy for the company's location. The federal statutes listed by Delaware (Br. 71-72 n.85) merely expand the types of unclaimed property that the federal government has chosen to escheat; they do not address the common law rules of escheat priority established in *Texas* v. *New Jersey*.

[82] *See infra* note 86.

[83] We see no need to respond to New York's separate argument, made in passing without case or statutory support, that there should be some statute of limitations or laches bar in this case. *See* N.Y. Br. 92. The Special Master has adequately discussed the flaws in this contention, with case and statutory support. Report 74-76.

tain all distributions taken from brokerage firms to which it is entitled under the backup rule as the State of the issuer.

The Special Master's recommendation that the backup rule should apply to the funds New York has taken from DTC and banks is also clearly correct. The choice of the State of the issuer over the State of the intermediary under the backup rule is grounded in this Court's earlier decisions. The Master's "teas[ing] out" of what he termed an "ambiguity" in the backup rule of *Texas* v. *New Jersey* to reach this result hardly constitutes fundamental law-changing activity. Report 73. *See generally Ashland Oil*, 110 S. Ct. at 3204-05; *James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. 2439, 2448 (1991) (White, J., concurring) (a "reasonably foreseeable" decision does not rise to the level of a "new rule" under *Chevron Oil*).

The only real question is whether the Master's proposed departure from the locational definition used in *Texas* v. *New Jersey*—looking to the State where an issuer maintains its principal executive offices rather than to its State of incorporation—provides a reason to resist full application of this aspect of the recommended rule to the DTC and bank funds. Again, we believe the Master gave the correct answer because New York has not demonstrated that it relied upon the *Texas* v. *New Jersey* locational definition in taking these distributions.

New York took distributions from DTC and custodian banks under a clearly overbroad, pre-*Texas* v. *New Jersey* statute that purports to reach all unclaimed intangible property "held or owing" in New York. APL § 300 (1)(e). Indeed, the APL covers property, including owner-unknown distributions, held by banks organized under the laws of States other than New York. APL § 300(4). These seizures were thus scarcely the product of New York's studied reliance on *Texas* v. *New Jersey*'s use of State of incorporation as a proxy for location.[84] Even if

---

[84] New York's contempt for this Court's escheat rules did not cease even after the filing of this case. New York acknowledges

New York could so argue, the Special Master correctly found that New York did not take distributions from DTC and banks as the State of the issuer. Report 73. New York therefore could not have relied upon the previous definition of an issuer's location. *Id.*

At bottom, New York's objection to retroactivity is based, not on reliance, but on a plea of "hardship," *i.e.*, that the amount of windfall payments that it will now have to relinquish is large, and the administrative task of redistributing those funds among the States that are entitled to them is burdensome. The specter of paying a large dollar amount alone does not justify the Court's limiting its ruling to future cases, *see, e.g., McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 50 (1990), nor does New York's assertion that it would be administratively inconvenient to turn over to other States the funds that it has wrongfully seized. As the Special Master noted, New York's "failure to maintain a custodial account that exceeded more than a tiny fraction of the payment obligation exposure New York faced is not so much an issue of hardship as it is one of indifference or calculated gamble." Report 76 n.68. Indeed, under the Master's recommendations, New York would be able to retain a substantial amount of the funds it has taken, because New York is the State of the principal executive offices of a large number of issuers—a fact that may explain New York's lack of objection to the Master's recommended definition of an issuer's location.[85]

---

that it continued to seize large amounts of disputed property between 1989 and 1991. *See* N.Y. Resp. No. 5(d) (April 27, 1990); N.Y. Br. 91.

[85] Delaware asks the Court to redistribute all property wrongfully taken by New York among Delaware and other States in accordance with the old locational proxy rather than the Master's proposed definition. Del. Br. 76-83. The fact that Delaware would like to maximize its future recovery, however, hardly gives rise to a claim of past reliance. Delaware also questions whether the Master's recommendation as to retroactivity might not have an

In *Pennsylvania* v. *New York*, this Court rejected an effort by the State of New York to give the decision only prospective application. The Court held there that "the *Texas* rule 'be applied to all the items involved in this case regardless of the date of the transactions out of which they arose.'" 407 U.S. at 212-13 (quoting Report of its Special Master at 21). Certain of the transactions at issue in *Pennsylvania* v. *New York* occurred as long ago as 1930, thirty-five years before the Court's decision in *Texas v. New Jersey*. *Id.* at 212. In seeking to explain away the *Pennsylvania* decision, New York asserts in its present brief that retroactivity there was compelled by "the core principle of [the Court's] escheat jurisprudence, that a State lacks the jurisdiction to unilaterally cut off the rights of other States asserting superior claims to the property." N.Y. Br. 82. That is precisely correct. *See generally Texas* v. *New Jersey*, 379 U.S. at 682. Indeed, New York's own law designates New York as a mere custodian of the disputed funds.[86] It therefore should not be permitted to cut off the Master's recommended allocation of all the disputed funds to the many States (including New York and Delaware) in which a relevant issuer maintains its principal executive offices.

---

undesirable preclusive effect in future cases where (unlike here) a State can demonstrate detrimental reliance upon the "State of incorporation" locational proxy in receiving and retaining distributions. *See* Del. Br. 78-79. Insofar as Delaware's point is that the disposition in this case should not foreclose nonretroactivity arguments in other cases involving different circumstances, we register no disagreement. *See James B. Beam Distilling Co.* v. *Georgia*, 111 S. Ct. at 2444, 2446, 2448.

[86] One of the central purposes of the New York legislature's general revision of its Abandoned Property Law in 1943 was "to change the policy of the State [in takings such as are involved in this case] from confiscation to custodial protection." *In re Menschefrend's Estate*, 283 A.D. 463, 466, 128 N.Y.S.2d 738 (1954), *aff'd*, 8 N.Y.2d 1093, 170 N.E.2d 902, 208 N.Y.S.2d 453 (1960), *cert. denied*, 365 U.S. 842 (1961); N.Y. Br. 2 ("the policy of the State is custodial protection, not confiscation"). Such statutes merely authorize States to act as conservators of the property on behalf of the missing owners. *See Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 547 (1948).

CONCLUSION

The Special Master's recommendations with respect to the interpretation and application of the priority rules of *Texas* v. *New Jersey* are the product of an extraordinarily well-reasoned and faithful analysis of this Court's decisions. His selection under the backup rule of the State of the issuer over that of the conduit intermediary "is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." *Texas* v. *New Jersey*, 379 U.S. at 683. Separately, the Master's proposed modification in the backup rule's locational definition would substantially further the policies underlying *Texas* v. *New Jersey* in light of developments since 1965 without disturbing any reliance interests. Accordingly, the undersigned thirty-one States, joining sixteen other States and the District of Columbia, respectfully request that the Court adopt the Special Master's recommendations in their entirety.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney General
YEORYIOS C. APALLAS
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for Plaintiff-Intervenor State of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

July 27, 1992

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

CHRIS GORMAN
Attorney General of Kentucky
700 Capitol Avenue
Capitol Building, Suite 116
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN112
Trenton, New Jersey 08625
(609) 292-4925

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARIO J. PALUMBO
Attorney General of West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 348-2021

JOHN P. ARNOLD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301-
6397
(603) 271-3658

NICHOLAS J. SPAETH
Attorney General of
North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General of Washington
Highways-Licenses Building,
PB71
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

(46)

No. 111 Original

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN RESPONSE TO EXCEPTIONS AND BRIEFS OF PUTATIVE INTERVENORS, STATES OF MICHIGAN, MARYLAND AND NEBRASKA AND THE DISTRICT OF COLUMBIA, AND OF DEFENDANT, STATE OF NEW YORK

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000

Attorneys for Plaintiff,
State of Delaware

July 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTRODUCTION AND SUMMARY	2
ARGUMENT	4
I. THE MICHIGAN GROUP'S CANDID PLEA TO ABANDON THE *TEXAS* RULE AND ADOPT A SPECIAL SCHEME FOR THIS CASE SHOULD BE REJECTED, AS SHOULD THE INDIRECT APPROACH OF THE MASTER'S REPORT TO THE SAME END	4
A. The Michigan Group's Candor About the Intervenors' Agenda	5
B. The Michigan Group's Misunderstanding of *Stare Decisis* and the Role of Court and Congress	7
C. The Michigan Group's Proposal That the Court Try to Make the Parties Settle	15
II. THE ALABAMA INTERVENORS' "STATEMENT" SUPPORTING THE MASTER'S REPORT DEMONSTRATES A DEVOTION TO OPPORTUNITY, NOT PRINCIPLE	19
III. JUDGMENT SHOULD BE ENTERED AGAINST NEW YORK AS TO THE DELAWARE BROKERAGE CORPORATIONS UNDER THE BACKUP RULE	22
A. New York's Position	22
B. New York's Factual Theory—The Problem of "Nominee Float"	24
C. The Breaks in New York's Chain of Logic	29
1. "Float" is not the only source of unclaimed property in this case	29
2. "Floating" certificates are delivered by brokers to nonbrokers	30

TABLE OF CONTENTS—Continued

Page

3. Particular "floating" certificates cannot be matched to overages 31
4. The bearer-owner's identity as of the record date cannot be ascertained from the delivering broker's records 32
5. Many brokers cannot be said to have New York addresses 36

CONCLUSION 38

APPENDICES

A. Scorecard of Positions 1a
B. First Round Litigating-Position Statutes 18a
C. Second Round Litigating-Position Statutes 21a

TABLE OF AUTHORITIES

Cases:	Page
In re Agent Orange Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied sub nom. Pinkney* v. *Dow Chem. Co.*, 484 U.S. 1004 (1988)	16
In re Agent Orange Prod. Liab. Litig., 818 F.2d 179 (2d Cir. 1987), *cert. denied sub nom. Krupkin* v. *Dow Chem. Co.*, 487 U.S. 1234 (1988)	16
Allied-Signal, Inc. v. *Director, Division of Taxation*, 112 S. Ct. 2251 (1992)	7, 10-13
Ankenbrandt v. *Richards*, 112 S. Ct. 2206 (1992)	7, 9
Burlington N. R.R. v. *Ford*, 112 S. Ct. 2184 (1992)	11
California v. *Acevedo*, 111 S. Ct. 1982 (1991)	9
Colorado v. *New Mexico*, 467 U.S. 310 (1984)	22
Commonwealth Edison Co. v. *Montana*, 453 U.S. 609 (1981)	8
Connecticut Mut. Life Ins. Co. v. *Moore*, 333 U.S. 541 (1948)	18
Container Corp. of Am. v. *Franchise Tax Bd.*, 463 U.S. 159 (1983)	17
In re Dep't of Energy Stripper Well Exemption Litig., 653 F. Supp. 108 (D. Kan. 1986), *aff'd*, 855 F.2d 865 (Temp. Emer. Ct. App. 1988)	16
Eastman Kodak Co. v. *Image Technical Servs.*, 112 S. Ct. 2072 (1992)	7, 10
Lee v. *Weisman*, No. 90-1014 (U.S. June 24, 1992) (to be reported at 112 S. Ct. 2649)	7
Local 93, Int'l Ass'n of Firefighters v. *City of Cleveland*, 478 U.S. 501 (1986)	16
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803)	5
Miller Bros. v. *Maryland*, 347 U.S. 340 (1954)	10
National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967)	7, 8
National Geographic Soc'y v. *California Bd. of Equalization*, 430 U.S. 551 (1977)	10
Nebraska v. *Wyoming*, 325 U.S. 589 (1945)	17

TABLE OF AUTHORITIES—Continued

	Page
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989)	9, 13
Pennsylvania v. *New York*, 407 U.S. 206 (1972)	*passim*
Prudential Ins. Co. v. *Alabama*, No. C-4937-83E (N.J. Super. Ct. Ch. Div.) (Complaint filed November 23, 1983)	16
Quill Corp. v. *North Dakota*, 112 S. Ct. 1904 (1992)	7-9, 13
South Carolina v. *Baker*, 485 U.S. 505 1988)	24, 34
Standard Oil Co. v. *New Jersey*, 341 U.S. 428 (1951)	18
Texas v. *New Jersey*, 379 U.S. 674 (1965)	*passim*
United States v. *Exxon Corp.*, 561 F. Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 1105 (1986)	16
Vermont v. *New York*, 417 U.S. 270 (1974)	15, 16
West Virginia v. *Chas. Pfizer & Co.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971)	16
Western Union Tel. Co. v. *Pennsylvania*, 368 U.S. 71 (1961)	18

Constitutional Provisions:

U.S. Const. art. I, § 8, cl. 3 (Commerce Clause)	9, 10
U.S. Const. amend. XIV, § 1 (Due Process Clause)	10, 11

Statutes:

Disposition of Abandoned Money Orders and Traveler's Checks Act, Pub. L. No. 93-495, Title VI, §§ 601 to 603, 88 Stat. 1500, 1525-26 (1974) (codified at 12 U.S.C. §§ 2501 to 2503 (1988) and reprinted in Del. Opening Br. at App. A, pp. 1a-3a)	14
1991 Ala. Act No. 577 (codified at Ala. Code § 35-12-50 (Michie 1991))	20
1991 Ark. Act No. 1245 (codified at Ark. Code Ann. § 18-28-208(b) (Michie Supp. 1991))	20

TABLE OF AUTHORITIES—Continued

Page

1992 Ark. Act No. 7, enacted Feb. 27, 1992 (amending Ark. Code Ann. § 18-28-208 (Michie Supp. 1991)) 21
1990 Fla. Laws ch. 113 (codified at Fla. Stat. Ann. § 717.1035 (West Supp. 1992)) 20
1992 Fla. Acts ch. 169, § 2, 1992 Fla. Sess. Law. Serv. 1371, 1372 (West), enacted April 9, 1992 (amending Fla. Stat. Ann. § 717.1035 (West Supp. 1992)) 21
1992 Ga. Law No. 979, § 7, enacted April 13, 1992 (adding Ga. Code Ann. § 44-12-201) 21
1990 Haw. Sess. Laws ch. 31 (codified at Haw. Rev. Stat. § 523A-2.5 (Supp. 1991)) 20
1992 Haw. Sess. Law No. 133, enacted June 3, 1992 (amending Haw. Rev. Stat. § 523A-2.5 (Supp. 1991)) 21
1991 Ill. Law No. 206 (codified at Ill. Ann. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992)) .. 20
1991 Ind. Act No. 204 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992)) 20
1992 Ind. Act No. 135, enacted Feb. 21, 1992 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992)) 21
1990 Iowa Acts ch. 1095 (codified at Iowa Code Ann. § 556.9A (West Supp. 1992)) 20
1992 Iowa Acts ch. 1038 (S.F. No. 2174), 1992 Iowa Legis. Serv. 76, 77 (West), enacted April 9, 1992 (amending Iowa Code Ann. § 556.9A (West Supp. 1992)) 21
1990 Kan. Sess. Laws ch. 196 (codified at Kan. Stat. Ann. § 58-3933 (Supp. 1991)) 20
1992 Kan. Sess. Laws ch. 36, enacted April 16, 1992 (amending Kan. Stat. Ann. § 58-3933 (Supp. 1991)) 21
1991 La. Act No. 209 (codified at La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992)) 20
1992 La. Act No. 73, enacted June 5, 1992 (amending La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992)) 21

TABLE OF AUTHORITIES—Continued

	Page
1992 Me. Acts ch. 756, enacted March 27, 1992 (adding Me. Rev. Stat. Ann. tit. 33, § 1811-A)	21
1991 Miss. Laws ch. 451, § 7 (codified at Miss. Code Ann. § 89-12-14 (1991))	20
1992 Miss. Laws ch. 408, enacted April 27, 1992 (amending Miss. Code Ann. § 89-12-14 (1991))	21
1990 Mo. Laws, H.B. No. 1052 (codified at Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992))	20
1991 Mont. Laws ch. 654 (codified at Mont. Code Ann. § 70-9-210 (1991))	20-21
1991 Nev. Stat. ch. 149, § 1, p. 287 (codified at Nev. Rev. Stat. Ann. § 120A.225 (Michie Supp. 1991))	21
1990 N.H. Laws ch. 105, § 13 (codified at N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991))	21
1992 N.H. Laws ch. 289, § 51, enacted June 17, 1992 (amending N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991))	21
1991 N.D. Laws ch. 492 (codified at N.D. Cent. Code § 47-30.1-03.1 (Michie Supp. 1991))	21
1991 Okla. Sess. Laws ch. 331, § 19 (codified at Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992))	21
1992 Okla. Sess. Laws ch. 295, § 27, enacted May 26, 1992 (adding Okla. Stat. Ann. tit. 60, § 657.4)	21
1990 S.D. Laws ch. 352 (codified at S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990))	21
1992 S.D. Laws ch. 312, § 11A, enacted March 10, 1992 (replacing S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990) and adding S.D. Codified Laws Ann. § 43-41B-12)	21-22
1990 Utah Laws ch. 179 (codified at Utah Code Ann. § 78-44-4.5 (1992))	21
1992 Utah Laws ch. 74, enacted March 12, 1992 (codified at Utah Code Ann. § 78-44-4.5 (Supp. 1992))	22
1992 Wash. Laws ch. 48, enacted March 26, 1992 (to be codified between Wash. Rev. Code §§ 63.29.030 and 63.29.040)	22

TABLE OF AUTHORITIES—Continued

Page

1990 W. Va. Acts ch. 184 (codified at W. Va. Code Ann. § 36-8-8a (Michie Supp. 1992)) 21

Legislative Materials:

S. Rep. No. 505, 93d Cong., 1st Sess. 14

1991 Alaska H.B. No. 240, 17th Legis., 2d Reg. Sess. (introduced March 27, 1991) 21

1991 Alaska Sen. Concurrent Res. No. 40, 17th Legis., 2d Reg. Sess. (introduced May 10, 1992) (proposing new Alaska Stat. § 34.45.130) 22

1991 Ill. H.B. No. 3126, 87th Gen. Assem., 1991-92 Reg. Sess. (introduced March 31, 1992) (proposing to amend Ill. Rev. Stat. ch. 141, para. 108.2) 22

1991 Mo. H.B. No. 935, 86th Gen. Assem., 2d Reg. Sess. (introduced Jan. 8, 1992) (proposing to amend Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992)) 22

1991 Pa. H.B. No. 2308, 175th Gen. Assem., 1991-92 Reg. Sess. (introduced Jan. 21, 1992) (proposing new Pa. Stat. tit. 72, § 1301.2(a)(2)) 22

Rules:

Fed. R. Civ. P. 56(e) 28

National Securities Clearing Corp., *Rules & Procedures*, Rule 9 (filed with the SEC as Exhibit E to the NSCC's form CA-1) 37

Scholarly Authorities:

Egon Guttman, *Modern Securities Transfers* (3d ed. 1987) 25

William D. Hawkland, *et al.*, *UCC Series* (1990) .. 24, 25

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

and

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN RESPONSE TO EXCEPTIONS AND BRIEFS OF PUTATIVE INTERVENORS, STATES OF MICHIGAN, MARYLAND AND NEBRASKA AND THE DISTRICT OF COLUMBIA, AND OF DEFENDANT, STATE OF NEW YORK

Plaintiff, State of Delaware ("Delaware"), respectfully submits this brief in response to the exceptions and briefs of: (1) Putative Intervenors Michigan, Maryland, Nebraska and the District of Columbia (the "Michigan group"); and (2) Defendant, the State of New York ("New York").[1]

---

[1] Aside from Delaware and New York, all states and the District of Columbia have moved to intervene. Texas' motion was granted; the other states are putative intervenors, having been full par-

In additon to Delaware's, two sets of exceptions to the Master's Report (the "Report") were filed, one by the Michigan group, the other by New York. The remaining group of states (the "Texas group") has not taken any exception to the Report, although one subgroup (the "Alabama subgroup") has filed a short "Statement" supporting the Report. We understand that the two Texas subgroups (the Alabama subgroup and the Arizona subgroup) will file their briefs supporting the Report simultaneously with this Brief.

INTRODUCTION AND SUMMARY

The Michigan group's position is that the Court should abandon the rule of law laid down in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), in favor of some kind of yet-to-be-determined "equitable allocation" among the states.[2] This group's claim that its approach is grounded in "fairness" is disingenuous. Its real agenda is pure opportunism: according to its counsel, the ordinary rules should not be applied here because this case "controls a very large amount of funds" (Tr. of Oral Argument before the Master 73-74 (Feb. 14, 1991)). For the Michigan group, the only question to be answered is whether the amount of money at issue "looms extremely large in comparison to the costs of litigating." *Id.* at 75. The Michigan group's "exception" to the Report is in fact only marginally an exception at all—it is "satisfied with the Master's

---

ticipants in the proceedings before the Master and either having expressed, or having proposed to express, their views on the Report to the Court.

[2] This argument was made by a larger group of putative Intervenors led earlier in the case by California; California and some of the others have abandoned this position and joined the Texas group, leaving only Michigan, Maryland, Nebraska, and the District of Columbia to assert it. We earlier referred to the "California group" (*see* Del. Opening Br. 21, 23); in its place we now refer to the smaller "Michigan group." *See* our scorecard, Appendix A, *infra*.

result" (Mich. Br. 3, 29)—a result which is the distribution of a "large pool" of money to as many states as possible (*id.* at 3). *See* Part I, pp. 4-19, *infra.*

While they are less blatant (or possibly less candid), the other Intervenors have been driven by opportunism as well: their behavior in this litigation may be characterized as participation in an informal one-issue constitutional convention, with positions changing in the winds of expediency, and with the production and enactment of revisions of state statutes to reflect each successive litigating theory. *See* Part II, pp. 19-22, *infra.*

Finally, New York is as opportunistic as the Intervenors. It embraces adherence to *some* rules. It and several *amici* industry organizations make a convincing demonstration that changing the present rule that the holder of the unclaimed property is the "debtor" under the *Texas* rule would create an administrative nightmare. But New York expressly declines (without explanation) to take exception to the Master's recommendation that the Court abandon the "state of incorporation" rule in favor of a new "state of principal executive office" rule. N.Y. Br. 73. No explanation is needed: with a substantial part of the securities industry's executive headquarters centered in New York City, New York stands to gain much in this case from a change in the state of incorporation rule.[3]

---

[3] New York contends for a unique permutation of the rule changes recommended by the Master: it urges retention of the "holder as debtor" rule (quite properly), but embraces the change from the "state of incorporation" rule to the "state of principal executive office" rule. New York apparently intends the latter as an alternative to its "factual" contention that the "overages" in the hands of the brokerage firms (most of which are incorporated in Delaware) are to pass under the primary rule as "owner/address known" property. If they pass under the backup rule instead, and that rule is modified as New York suggests, then the overages will be escheatable to New York whenever the brokerage firms have their principal executive offices in New York. *See generally* Part III A & B, pp. 22-28, *infra.*

New York's primary position—that *brokers'* overages are actually "owner/address *known*"—is based on a series of erroneous or unprovable assertions; most critically, it suffers from a "central inconsistency" (Report 61 n.53): New York cannot support its assertion that the brokers' overages differ from those of the DTC and of the bank custodians, which it admits are "owner/address unknown." The reason why New York insists that they do differ also requires little explanation: New York wants to have its cake and eat it too—it would keep the owner/address unknown funds in the hands of the DTC and the New York bank custodians (to which Delaware makes no claim because they are not Delaware corporations) as well as the owner/address unknown funds that New York has improperly taken from those brokers that *are* Delaware corporations. The Master found there could be no reasonable dispute over this factual issue, and he was correct. *See* Part III, pp. 22-38, *infra*.

ARGUMENT

I. THE MICHIGAN GROUP'S CANDID PLEA TO ABANDON THE *TEXAS* RULE AND ADOPT A SPECIAL SCHEME FOR THIS CASE SHOULD BE REJECTED, AS SHOULD THE INDIRECT APPROACH OF THE MASTER'S REPORT TO THE SAME END

The Michigan group is commendably honest about its agenda: it would have the Court sweep away the established rules. It views the Report as having done so.

The Michigan group's approach begins from a fundamental misunderstanding of the doctrine of *stare decisis* and the respective roles of the Court and Congress in an area like this one, where Congress remains free to alter what the Court has done. Next, it urges the Court to announce that it will abandon the old rule and then command the parties to negotiate a settlement. That is inconsistent with the Court's duty to "say what the law

is." *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Finally, its approach is impractical to boot.

A. The Michigan Group's Candor About the Intervenors' Agenda

The Michigan group makes a candid plea that the Court abandon the settled rules established in *Texas* v. *New Jersey*, 379 U.S. 674 (1965), and *Pennsylvania* v. *New York*, 407 U.S. 206 (1972). That this plea is nothing more than a naked grab for money is apparent from the first line of its brief—the states "endorse the Master's result," but "think it is possible to improve upon it"—if the Court would only drop the Master's pretense of abiding (at least in part) by the rule of *stare decisis*. Mich. Br. 2; *see id.* at 2 ("result" should be avoidance of "diversion" of funds to Delaware); 3 (arguing for more straightforward way to "achieve the Master's result"); 10 (same); 14-15 ("Master's result" preferable).

The Michigan group says that it believes that the Master was "hesitant to adopt it [his approach] (or ours) directly on that basis," that is, the basis of giving a "large pool" of money to lots of states. *Id.* at 2. The reason for the Master's reluctance given by the Michigan group is that

> he feels that the *stare decisis* impact of *Pennsylvania* v. *New York*, 407 U.S. 206 (1972), and "institutional" concerns for Congressional prerogatives,[4] preclude the Court from doing so without dealing with the "backup rule" applied in that case. He therefore reaches his result indirectly. First he "teases out", Mas. Rep. at 50, and resolves an ambiguity as to the identity of the "debtor" in the *Texas* v. *New Jersey*, 379 U.S. 674 (1965) "backup" rule, as applied here. He decides that the debtor should be [*sic*] the "issuer" of the underlying securities rather than the "holder" of the unclaimed funds. Next he modi-

---

[4] Presumably the law-making function of Congress.

> fies the locational presumption for that debtor, looking to its principal executive office rather than its state of incorporation.

Mich. Br. 2-3.

In this spirit of candor as to what the Master was doing, the Michigan group continues:

> We believe that the Court may not wish to be so begrudging of its own authority, and may prefer to achieve the Master's result—or another at least as equitable—by proceeding directly from the basic principles it enunciated in *Texas* v. *New Jersey* to achieve a fair and efficient allocation of the funds at issue here.

Mich. Br. 3.

The Michigan group's evaluation may be misguided, but its frankness is to be commended. The Michigan group acknowledges that the Report was driven by inductive reasoning leading to a preconceived result, rather than by a neutral application of the rule of law; it acknowledges that the Report engaged in "dissecting and reconstructing the old backup rule" (Mich. Br. 14) to reach its result; and it acknowledges that the Master thought he had to "dress his result in the raiment of the old formula." Mich. Br. 3. Indeed, describing the Report as having engaged in a "semantic exercise," the Michigan group goes so far as to concede that the Report is not "congruent with the holding in *Pennsylvania* v. *New York* [and is] more than a 'minor change' in the prior 'backup' rule." Mich. Br. 16 (quoting Report 49). But because the Michigan group concludes that the backup rule of *Texas* and *Pennsylvania* has no "*stare decisis* effect," it urges this Court to do "directly and forthrightly" what the Master did by "circumnavigations": "overtly depart from the old rule." Mich. Br. 14.

B. The Michigan Group's Misunderstanding of *Stare Decisis* and the Role of Court and Congress

The Michigan group makes only a begrudging reference to the doctrine of *stare decisis*. Mich. Br. 12 & n.13. It fails to come to grips with the central importance of *stare decisis* in this Court's jurisprudence and the several factors that give it special force in this case—the heavy burden a litigant bears in persuading the Court to depart from a rule announced not once but twice, the undesirability of departing from precedent where Congress may modify the rules, Congress' acceptance of the *Texas* rule, and the settled expectations of the states and private actors who have come to rely on this Court's rules. *See* Del. Opening Br. 70-79; *see also Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904 (1992) (discussed *infra* through p. 9); *Allied-Signal, Inc.* v. *Director, Division of Taxation*, 112 S. Ct. 2251 (1992) (discussed *infra* at pp. 10-13). The Michigan group's plea to overturn the *Texas* rule does not even hint at whether this case presents one of the traditional justifications for departure from precedent—namely, that the rule is unsound in principle, unworkable in practice, or inconsistent with the Court's sense of justice. The rules here are not. *See* Del. Opening Br. 74-76.

After the first round of briefing in this case, this Court has taken several occasions to confirm its commitment to the doctrine of *stare decisis*. *See Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-16 (1992); *Eastman Kodak Co.* v. *Image Technical Servs.*, 112 S. Ct. 2072, 2089 n.29 (1992); *Ankenbrandt* v. *Richards*, 112 S. Ct. 2206, 2213 (1992); *Allied-Signal, Inc.* v. *Director, Division of Taxation*, 112 S. Ct. 2251, 2261-62 (1992); *Lee* v. *Weisman*, No. 90-1014, slip op. at 7-8 (U.S. June 24, 1992) (to be reported at 112 S. Ct. 2649).

In *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904 (1992), the Court rejected a request to overrule its decision in *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 758 (1967), which had held that states

may not tax out-of-state mail-order sellers whose only connection with customers in the state is by common carrier or mail. The parallels between *Quill* and this case are instructive. Here, a bright-line test fashioned by the Court (state of incorporation of the holder) has been relied upon by private and state actors. Now, that test is being challenged as arbitrary. The Court in *Quill* rejected just such a challenge. "Like other bright-line tests," the Court explained, "the *Bellas Hess* rule appears artificial at its edges . . . . This artificiality, however, is more than offset by the benefits of a clear rule. Such a rule firmly establishes the boundaries of legitimate state authority. . . . [A] bright-line rule . . . encourages settled expectations." 112 S. Ct. at 1914-15 (citations omitted).

The decision in *Quill* not to renounce the *Bellas Hess* bright-line rule was "made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. . . . Congress remains free to disagree with our conclusions." 112 S. Ct. at 1916 (footnote omitted). Although arguments were made denouncing the fairness of the existing rule, the Court concluded that " 'the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.' " 112 S. Ct. at 1916 (quoting *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 638 (1981) (White, J., concurring)). This analysis was expanded upon by Justice Scalia, concurring:

> I would not revisit the merits of [the *Bellas Hess*] holding, but would adhere to it on the basis of *stare decisis*. Congress has the final say over regulation of interstate commerce, and it can change the rule of *Bellas Hess* by simply saying so. We have long recognized that the doctrine of *stare decisis* has special force where Congress remains free to alter what we have done.

112 S. Ct. at 1923 (citations and quotation marks omitted). These principles apply as strongly in this case

as they did in *Quill*, which also involved an area (the "negative" implications of the Commerce Clause) where the Court has laid down rules effective only in the absence of congressional action. Like *Quill*, this case can best be resolved by deference to Congress, which has not altered the *Texas* rule.

This case involves an area where Congress undeniably has the authority to establish the rules, but has not done so. In *Texas*, this Court fulfilled its obligation to step in and fill the gap. 379 U.S. at 677. And Congress has declined to disturb the rules established by the Court, although it has visited the subject matter of escheat and unclaimed property many times since *Texas* was decided. *See* Del. Opening Br. 8 & n.5, 71-73 & n.85. The question presented by the various requests to overturn the *Texas* rule is not, as the Michigan group suggests, the raw *power* of the Court to "revise its own rules" (Mich. Br. 24); the question is whether doing so comports with the "profoundly important purposes" served by the doctrine of *stare decisis*, *California* v. *Acevedo*, 111 S. Ct. 1982, 1991 (1991), in the context of a subject matter controlled by Congress. *Quill* answers that question in the negative.[5]

---

[5] So does *Ankenbrandt* v. *Richards*, 112 S. Ct. 2206 (1992), also decided since the first round of briefing in this case. In that case, the Court again confirmed that "[c]onsiderations of *stare decisis* have particular strength . . . where 'the legislative power is implicated, and Congress remains free to alter what we have done.'" 112 S. Ct. at 2213 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989)). The Court was "unwilling to cast aside" its long-standing interpretation of the diversity statute as containing a domestic relations exception. It did not revisit the earlier debate over the statutory language, but was "content to rest [its] conclusion . . . on Congress' apparent acceptance of this construction." 112 S. Ct. at 2210, 2213. The Court explained that *stare decisis* combined with its respect for the role of Congress to preclude a change in the rule: "[g]iven the long passage of time without any expression of congressional dissatisfaction, we have no trouble today reaffirming the validity of the exception as it

In *Allied-Signal, Inc.* v. *Director, Division of Taxation*, 112 S. Ct. 2251 (1992), also decided after the first round of briefing in this case, the Court rejected New Jersey's request that the Court "depart from the doctrine of *stare decisis* by overruling our cases which announce and follow the unitary business standard" for evaluating a state taxing scheme's compliance with the Due Process Clause. 112 S. Ct. at 2261.[6] The Court's discussion of the traditional justifications for a departure from *stare decisis* provides additional support for Delaware's view that no departure should be made here.

The *Allied-Signal* Court first evaluated whether the unitary business standard was "unsound in principle." 112 S. Ct. at 2261. In preserving the standard's traditional focus on the taxpayer's activities within the taxing state, the Court held that the inquiry whether the taxpayer's unitary business has some connection with the taxing state "is necessary if the limits of the Due Process and Commerce Clauses are to have substance in a modern economy." 112 S. Ct. at 2262. The *Allied-Signal* decision's reaffirmation of the need to preserve the Due Process Clause's limits on the exercise of state sovereignty provides particular guidance here. Here, ironically, the Michigan group's proposal—and the Report's—would vitiate the Due Process Clause's requirement of a nexus with the state exercising sovereignty over the holder of funds. *See National Geographic Soc'y* v. *California Bd. of Equalization*, 430 U.S. 551, 554 (1977); *Miller Bros.* v. *Maryland*, 347 U.S. 340, 344-45 (1954) (discussed in Del. Opening Br. 34-35 & n.40). Whatever the rules are, it is the *holder*, of course, who must pay the money to the

---

pertains to divorce and alimony decrees and child custody orders." 112 S. Ct. at 2215; *see also Eastman Kodak Co.* v. *Image Technical Servs.*, 112 S. Ct. 2072, 2089 n.29 (1992).

[6] The Court was unanimous in concluding that no departure from *stare decisis* was warranted. 112 S. Ct. at 2264-65 (O'Connor, J., dissenting).

state or risk the state's imposition of penalties and interest. Yet under both the Master's proposal and the Michigan group's, a state with no connection at all to the holder may subject the holder to its laws and penalize the holder for noncompliance. It is hardly evident that these proposals comport with the limits imposed on the states by the Due Process Clause. The *Texas* rule, in contrast, grew out of this Court's holdings defining the limits of state power to escheat imposed by the Due Process Clause—indeed, it gives content to those limitations by implementing a system that protects holders' rights and, at the same time, allows states to exercise their escheat powers without conflict among themselves. *See* Del. Opening Br. 2-6 & n.2, 33-37. Proposals like those of the Michigan group and the Master, we submit, are the ones that are "unsound in principle."

The *Allied-Signal* Court also considered whether the present standard was "unworkable in practice." 112 S. Ct. at 2262. In this case, of course, no one has argued that the present rule is actually "unworkable." Irrelevantly, all that is contended is that the replacement rules themselves might also be "workable." Mich. Br. 27-28; Report 39, 42-45.[7]

The Court's opinion in *Allied-Signal* points up another serious flaw in the proposals to abandon the *Texas* rule. Here, as in *Allied-Signal*, abandoning the Court's "settled jurisprudence defining the limits of state power" (112

---

[7] The Report's proposals have been strongly shown to be unworkable. *See* Securities Industry Ass'n, *et al.* ("SIA"), *Amici* Br. 13-16, 18-20; N.Y. Br. 66-69 (each explaining why "issuer as debtor" rule would be disastrous); Del. Opening Br. 31-33 (ease of application of current "holder as debtor" rule); *id.* at 56-61 (difficulties to be encountered by disregarding rule of corporate domicile); SIA *Amici* Br. 16-20 (same). This Court recently observed that it is reasonable to conclude that "the location of a [corporation's] principal place of business would *not* be as readily verifiable as its State of incorporation." *Burlington N. R.R.* v. *Ford*, 112 S. Ct. 2184, 2187 (1992) (emphasis added).

S. Ct. at 2262) would itself be unworkable. In *Allied-Signal*, the Court explained, "[s]tate legislatures have relied upon our precedents by enacting tax codes" that abide by the current rules. 112 S. Ct. at 2262. Adopting New Jersey's theory in *Allied-Signal* would have required invalidation of those statutes or authorization of double taxation, thereby defeating "the reliance interest of those corporations which have structured their activities and paid their taxes based upon the well-established rules we here confirm." 112 S. Ct. at 2262. Here, too, states and private actors have relied on the well-established *Texas* rule in enacting statutes and establishing compliance mechanisms, such as the Unclaimed Property Clearinghouse. The uniform acts also reflect the states' reliance on the *Texas* rule. *See* Del. Opening Br. 10-11.[8] And private actors have expressed their reliance on the *Texas* rule: *amici*—the Securities Industry Association, the New York Clearing House Association, the American Bankers Association, and the Depository Trust Company—have sought leave to inform the Court of the "immediate, adverse impact on their future reporting obligations, as well as upon their day-to-day operations" that adopting the Master's Report would have. Motion for Leave to file Brief of SIA *Amici Curiae* vi; Brief 4; *see* Brief 13-20. As in *Allied-Signal*, the "unworkability" of the changes proposed by the Intervenors and the Master stems not only from the inherent infirmities of the proposed alternatives (*see* materials cited at p. 11 n.7, *supra*), but also from the strong reliance interests and settled expectations of the states and the private persons.

Another "workability" problem may be averted by adherence to precedent in this case—the problem of retroactivity. This, too, was a factor against the workability of the new rules proposed in *Allied-Signal*. 112 S. Ct. at

---

[8] Since this case began, a number of the intervening states have modified their statutes to reflect their litigating position in this Court. *See* pp. 20-22, *infra*.

2262 ("Difficult questions respecting the retroactive effect of our decision would also be presented."); *accord Quill Corp.* v. *North Dakota*, 112 S. Ct. at 1916 n.10 (Overruling precedent "might raise thorny questions concerning the retroactive application of [use] taxes and might trigger unanticipated liability . . . . The precise allocation of such burdens is better resolved by Congress than this Court.").

Finally, it is significant that in *Allied-Signal*, the Court did not consider the third "traditional justification"—that the rule be inconsistent with "the sense of justice." The Court has expressed reservations about the availability of this justification where the subject matter is controlled by Congress. *See Patterson* v. *McLean Credit Union*, 491 U.S. 164, 174-75 (1989). Here, as in *Allied-Signal* and *Quill*, the proper body to consider whether the present rule comports with "the sense of justice" is Congress.

The Michigan group's failure to confront the doctrine of *stare decisis* is compounded by its misdescription of the precedents it recommends be overruled. According to the Michigan group, the Court in *Texas* did no more than provide broad-brush "guidelines" (Mich. Br. 6) to be developed on a case-by-case basis in the future. Mich. Br. 4-5. The *Texas* Court did nothing of the kind. The case presented "a question which should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence." 379 U.S. at 678. That the Court provided such a rule has never before been disputed. Indeed, the entire question to be resolved in *Pennsylvania* v. *New York* was whether the litigants had provided "a sufficient reason for carving out [an] exception to the *Texas* rule" because one state stood to collect more than the others under the backup rule when the subject matter "involve[d] a higher percentage of unknown addresses." 407 U.S. at 214. The Court adhered to the *Texas* rule, so that it would not have " 'to decide each escheat case on

the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts.'" 407 U.S. at 215 (quoting *Texas* v. *New Jersey*, 379 U.S. at 679).

The Michigan group ignores this holding, too, actually purporting to distinguish *Pennsylvania* v. *New York* on the ground that there is a larger quantity of money at issue here than there was in that case. Mich. Br. 11. That has never been a basis for departing from precedent, as *Pennsylvania* itself makes clear. And while the record on this point is inconclusive, the information in the public domain suggests that by far the larger proportion of escheatable property traceable to securities investment and distributions is escheatable under the *primary* rule of the *Texas* case, which no one, not even the Michigan group, has suggested be overruled. *See* Del. Opening Br. 12-14 n.17.[9] In other words, this case is not shown to disclose a category of economic activity where more is escheatable

---

[9] Finally, the Michigan group asserts that if the present "facts are indistinguishable from the 1972 facts," *Pennsylvania* has been "legislatively reversed." Mich. Br. 13 n.16. The Michigan group fails to differentiate between the general rule—set out in *Texas* and adhered to in *Pennsylvania*—and the specific area—money orders and traveler's checks—dealt with by Congress. Congress has never expressed any disapproval of the general rule. Indeed, just the opposite is true. *See* Del. Opening Br. 8 & n.5, 71-73. Instead, Congress made an express finding of fact that "a substantial majority" of the purchasers of money orders and traveler's checks reside in states where such instruments are purchased and that the cost of keeping track of addresses in this context was a burden on interstate commerce. Pub. L. No. 93-495, Title VI, § 601, 88 Stat. 1500, 1525-26 (1974) (codified at 12 U.S.C. § 2501 (1988)) (reprinted in Del. Opening Br. at App. A pp. 1a-3a). Congress expressly declined to go even as far as regular bank checks in the statute: they were expressly excluded and only money orders and traveler's checks were included. 12 U.S.C. § 2503; *see* S. Rep. No. 505, 93d Cong., 1st Sess. 5-6. Congress therefore modified the *Texas* rule only in one limited respect, leaving it to stand as a rule of general application. This Court's precedents suggest that it should do the same.

under the backup rule than the primary rule. In any event, the lesson of *Pennsylvania* is that one should *not* look to see how much money is involved and engage in semantic gamesmanship to achieve a result that spreads money evenly where there is a lot of it at stake; instead, *Pennsylvania* confirms that one should apply the *Texas* rule to all kinds of property in accordance with settled precedent. The Michigan group has demonstrated nothing unfair about doing so in this case under the lawyer-like rules articulated in *Texas* and adhered to in *Pennsylvania*.

C. The Michigan Group's Proposal That the Court Try to Make the Parties Settle

Essentially, the Michigan group asks not so much for the promulgation of a rule of law as that the Court try to make the states enter into a negotiated settlement. As the Michigan group explains it, it has presented an "example" (in the form of a computer program) of an "allocation formula" based on retail brokerage activity. But the Michigan group does not "want to prescribe a particular formula without input, and [it hopes], agreement, from the other states," by way of a "negotiated resolution[]." Mich. Br. 19 & n.24. This Court's role is to apply rules of law to the facts of a case, not to provide a structure for settlements among the litigants. *See Vermont* v. *New York*, 417 U.S. 270, 277 (1974). Moreover, the record contains no indication at all that the touchstone of the Michigan group's proposal—retail brokerage activity—has anything to do with this case. And the record suggests that settlement would hardly be achieved in the way suggested by the Michigan group.

1. The Michigan group asserts that this Court should engage in "judicial supervision of the division of a fixed fund among competing claimants." Mich. Br. 21. That is not this Court's duty. It cites no case—and we are aware of none—in which this Court has done so. Instead, it cites a mix of trial court cases that contain kind words about

the use of statistics, mainly in the context of trial court approval of voluntarily-negotiated settlements of large consumer class actions. Mich Br. 21-23.[10] A court's authority to approve a settlement that "provides broader relief than the court could have awarded after a trial" in a contested litigation, *Local 93, Int'l Ass'n of Firefighters* v. *City of Cleveland*, 478 U.S. 501, 525 (1986), is irrelevant where no such settlement is proposed. And the authority of a trial court to apply creative formulae devised by the parties to *settlement funds*,[11] does not provide any basis for this Court to abdicate its Article III function—to exercise the " 'judicial power' . . . which embraces the application of principles of law or equity to facts, distilled by hearings or stipulations." *Vermont* v. *New York*, 417 U.S. at 277.

The Michigan group also cites this Court's finding constitutional an income apportionment method enacted by

---

[10] These include *Prudential Insurance Co.* v. *Alabama*, No. C-4937-83E (N.J. Super. Ct. Ch. Div.) (Complaint filed Nov. 23, 1983); *In re Dep't of Energy Stripper Well Exemption Litig.*, 653 F. Supp. 108, 117 (D. Kan. 1986), *aff'd*, 855 F.2d 865 (Temp. Emer. Ct. App. 1988); *West Virginia* v. *Chas. Pfizer & Co.*, 314 F. Supp. 710, 729 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 841 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145, 170 (2d Cir. 1987), *cert. denied sub nom. Pinkney* v. *Dow Chem. Co.*, 484 U.S. 1004 (1988). One case, *United States* v. *Exxon Corp.*, 561 F. Supp. 816, 855-56 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 1105 (1986), involved disposition of a court-ordered restitution fund along lines set out in an Act of Congress that was intended to give the states money owed to consumers who could not be identified. *See United States* v. *Exxon Corp.*, 773 F.2d at 1312-13 (Becker, J., concurring in part and dissenting in part). The remainder of the cases cited by the Michigan group repeat the rule that a plaintiff who has proven liability may, in appropriate circumstances, rely upon statistical sampling methods to prove the *amount* of damages.

[11] *See, e.g., In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 179, 185 (2d Cir. 1987), *cert. denied sub nom. Krupkin* v. *Dow Chem. Co.*, 487 U.S. 1234 (1988).

a state legislature in *Container Corp. of America* v. *Franchise Tax Board*, 463 U.S. 159, 180-84 (1983); and it adverts to this Court's observation, in *Nebraska* v. *Wyoming*, 325 U.S. 589, 617 (1945), that the Court must often undertake the "delicate" and "extremely complex" problem of equitably apportioning water rights. These cases involved the application of principles of law to the facts presented. Neither of them even remotely suggests that it would be appropriate for this Court to overturn the *Texas* back-up rule, decline to announce a replacement rule of law, announce a broad principle of "equitable allocation" in delphic fashion, and then await negotiation of some yet-to-be-agreed-upon allocation formula to resolve the subject matter of this case.

2. The Michigan group's proposal also fails to contain any rational basis from which a "formula" of one kind or another could be derived. It proposes a formula based on retail brokerage activities. But its breezy assumption that such activities bear a relationship to the commercial activities giving rise to the property at issue in this case (Mich. Br. 18 n.22) is pure speculation. The record evidence is that the majority of overages (but by no means all) are caused by demands for certificates on extremely short notice, which are satisfied by providing certificates issued in the name of the nominee and endorsed by the nominee's signature so that they can be passed from hand to hand (close cousins to bearer certificates; but so long as record ownership is unchanged, dividends will be paid to the registered owner). *See* pp. 24-27, *infra*. The record evidence, however, does not support the notion that retail customers' transactions, or their wants and needs, are what lead to what is called the "float" problem. The record instances given of the "float" problem appear to involve not retail customers but institutions—participants in the DTC or large institutional customers of banks or brokers. Indeed, the record reflects that two of the three broker deponents testified that their firms' practice was to deliver en-

dorsed street name certificates only to institutional customers and not to retail customers. Said one: "Unless it's an institutional customer, it shouldn't happen. A retail customer, that should not happen . . . . Institutional customers you deliver street name stock to." Principe Dep. 63-64. "I just flat out would never" deliver such certificates to retail customers. *Id.* at 66.[12] Thus, even if there were some lawyerlike basis on which a "formula" could be imposed—and there is not—*no* evidence supporting a formula based on retail brokerage activity has been presented.

3. The Michigan group is unduly optimistic in assuming that if this Court announces in general terms that it desires an "equitable allocation" formula to be adopted, the states will generally agree on one. The Court's experience in this area demonstrates that, without the specific rules that were finally provided in *Texas* v. *New Jersey*, the states' rules were in frequent conflict. *See Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75-80 (1961); *Standard Oil Co.* v. *New Jersey*, 341 U.S. 428, 435-42 (1951); *Connecticut Mut. Life Ins. Co.* v. *Moore*, 333 U.S. 541, 548-51 (1948). It was only *after* the Court propounded a "clear rule" in *Texas* and adhered to it in *Pennsylvania* that the states were able to apply this lawyerlike definition without interstate conflict, a state of affairs that lasted for over two decades, until, having become putative intervenors in this case, a number of states decided to adopt new statutes agreeing with their current contentions. The Michigan group

[12] Principe was Internal Control Director of an affiliate of the Tucker Anthony brokerage firm. Merrill Lynch's practice appears the same—to give out such certificates to institutional customers but not individuals. Shearer Dep. 95-97. The practice of Prudential-Bache, the third brokerage, was apparently not as hard-edged as that of the other two houses, but its representative's testimony was that it was more usual for potentially "floating" securities to be delivered to institutions than to "retail customers." Cirrito Dep. 129; *see id.* at 226-27.

offers no reason why such conflict would be avoided under its proposal.

II. THE ALABAMA INTERVENORS' "STATEMENT" SUPPORTING THE MASTER'S REPORT DEMONSTRATES A DEVOTION TO OPPORTUNITY, NOT PRINCIPLE

A group of putative intervenors led by Alabama (and including former members of the Michigan group, California, Ohio, and Rhode Island) has filed a three-page "Statement" that supports the Report "fully."

The "Statement," read against the history of this suit, shows the odyssey of the Intervenors in this action. Before moving to intervene, several states in this group appeared as *amici* supporting Delaware and the "salutary" rule of *Texas* v. *New Jersey*, which they described —twice—as follows: "[i]f no record is available . . . . then the state of the *holder's incorporation* [is] entitled to escheat the property." [13] These states now take a different position. They now assert that the "holder" is not the "debtor." Moreover, these states and the entire membership of the Alabama subgroup of the Texas group (and we believe, based on the positions last taken by them before the Master, the Arizona subgroup of that group) now assert that the "domiciliary state" or "location" of a corporate debtor is not its state of incorporation but the state of its principal executive offices. But none of the states in either of these subgroups ever argued that the definition of corporate domicile in the backup rule should be anything other than the state of incorporation, until the Master thought up the idea and circulated it in his draft report in June 1991. All the states in these two subgroups, having originally supported the "state of incorporation" rule, now fully em-

---

[13] Brief of *Amici* Pennsylvania, Florida, Rhode Island, New Jersey, Arizona, Utah, and Arkansas (May 9, 1988) at 5; *see id.* at 9 (emphasis added).

brace the "state of principal executive offices" rule—as does New York. (For the Court's reference, we have included a scorecard (Appendix A, *infra*) providing the various positions of each state on the central legal issues in the case over the course of the litigation.)

Following their motions to intervene in this action, a large number of states have even gone so far as to modify their statutes to reflect their litigating position in this Court.[14] First, in 1990 and 1991, several states (each of which had already moved to intervene) added provisions that purported to require a holder—wherever located—to turn over funds if they "originated" from an issuer incorporated in the state.[15] Next came circulation

---

[14] We advised the Court in our opening brief that all of the state legislation on escheats adopted subsequent to the *Texas* and *Pennsylvania* cases embodied the "holder as debtor" and "state of incorporation" rules. Del. Opening Br. 10. In so stating, we overlooked these recent statutes adopted by the putative intervenors after the initiation of their intervention in this lawsuit, for which oversight we apologize to the Court. Our statement holds true as to the Uniform Acts promulgated by the Commissioners on Uniform State Laws. The similarities among the new statutes which seek to advance the litigating positions of the states adopting them cause one to see some unifying hand at work, but that hand is not that of the Commissioners on Uniform State Laws. See the statutes referred to in notes 15 and 16, *infra*, and in Appendices B and C.

[15] 1991 Ala. Act No. 577 (codified at Ala. Code § 35-12-50 (Michie 1991)); 1991 Ark. Act No. 1245 (codified at Ark. Code Ann. § 18-28-208(b) (Michie Supp. 1991)); 1990 Fla. Laws ch. 113 (codified at Fla. Stat. Ann. § 717.1035 (West Supp. 1992)); 1990 Haw. Sess. Laws ch. 31 (codified at Haw. Rev. Stat. § 523A-2.5 (Supp. 1991)); 1991 Ill. Law No. 206, § 4 (codified at Ill. Ann. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992)); 1991 Ind. Act No. 204 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992)); 1990 Iowa Acts ch. 1095 (codified at Iowa Code Ann. § 556.9A (West Supp. 1992)); 1990 Kan. Sess. Laws ch. 196 (codified at Kan. Stat. Ann. § 58-3933 (Supp. 1991)); 1991 La. Act No. 209 (codified at La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992)); 1991 Miss. Laws ch. 451, § 7 (codified at Miss. Code Ann. § 89-12-14 (1991)); 1990 Mo. Laws, H.B. No. 1052 (codified at Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992)); 1991 Mont. Laws

of the Master's draft report with his spontaneous abandonment of the "state of incorporation" principle, and its opportunistic embrace by the Texas group. There followed a 1992 legislative effort which modified the earlier form of revisionist statute so as to purport to cover funds that "originated" from an "issuer" incorporated "*or otherwise located*" in the state.[16] This, presumably

---

ch. 654 (codified at Mont. Code Ann. § 70-9-210 (1991)); 1991 Nev. Stat. ch. 149, § 1, p. 287 (codified at Nev. Rev. Stat. Ann. § 120A.225 (Michie Supp. 1991)); 1990 N.H. Laws ch. 105, § 13 (codified at N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991)); 1991 N.D. Laws ch. 492 (codified at N.D. Cent. Code § 47-30.1-03.1 (Michie Supp. 1991)); 1991 Okla. Sess. Laws ch. 331, § 19 (codified at Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992)); 1990 S.D. Laws ch. 352 (codified at S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990)); 1990 Utah Laws ch. 179 (codified at Utah Code Ann. § 78-44-4.5 (1992)); 1990 W. Va. Acts ch. 184 (codified at W. Va. Code Ann. § 36-8-8a (Michie Supp. 1992)); *see also* 1991 Alaska H.B. No. 240, 17th Legis., 2d Reg. Sess. (introduced March 27, 1991; not enacted). For the text of a sample statute and additional details, including dates of each state's motion to intervene and of enactment of each statute, see Appendix B.

[16] 1992 Ark. Act No. 7, enacted Feb. 27, 1992 (amending Ark. Code Ann. § 18-28-208 (Michie Supp. 1991)); 1992 Fla. Acts ch. 169, § 2, 1992 Fla. Sess. Law Serv. 1371, 1372 (West), enacted April 9, 1992 (amending Fla. Stat. Ann. § 717.1035 (West Supp. 1992)); 1992 Ga. Law No. 979, § 7, enacted April 13, 1992 (adding Ga. Code Ann. § 44-12-201); 1992 Haw. Sess. Law No. 133, enacted June 3, 1992 (amending Haw. Rev. Stat. § 523A-2.5 (Supp. 1991)); 1992 Ind. Act No. 135, enacted Feb. 24, 1992 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992)); 1992 Iowa Acts ch. 1038 (S.F. No. 2174), 1992 Iowa Legis. Serv. 76, 77 (West), enacted April 9, 1992 (amending Iowa Code Ann. § 556.9A (West Supp. 1992)); 1992 Kan. Sess. Laws ch. 36, enacted April 16, 1992 (amending Kan. Stat. Ann. § 58-3933 (Supp. 1991)); 1992 La. Act No. 73, enacted June 5, 1992 (amending La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992)); 1992 Me. Acts ch. 756, enacted March 27, 1992 (adding Me. Rev. Stat. Ann. tit. 33, § 1811-A); 1992 Miss. Laws ch. 408, enacted April 27, 1992 (amending Miss. Code Ann. § 89-12-14 (1991)); 1992 N.H. Laws ch. 289, § 51, enacted June 17, 1992 (amending N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991)); 1992 Okla. Sess. Laws ch. 295, § 27, enacted May 26, 1992 (adding Okla. Stat. Ann. tit. 60, § 657.4); 1992 S.D. Laws ch. 312, § 11A, enacted March 10, 1992 (replacing S.D. Codi-

to capture the Master's June 1991 proposal to change the "state of incorporation" rule. These "litigating-position" statutes are localized in one particular subgroup of Intervenors—the Alabama subgroup. The statutes demonstrate in a quite dramatic way the Intervenors' understanding that—prior to this case—the "holder" was the debtor under the *Texas* rule. Their departure from that understanding has no effect: no state "should be permitted to improve its legal position" in this Court by altering its behavior after the Court's "jurisdiction has been invoked." *See Colorado* v. *New Mexico*, 467 U.S. 310, 327 (1984) (Stevens, J., dissenting).

III. JUDGMENT SHOULD BE ENTERED AGAINST NEW YORK AS TO THE DELAWARE BROKERAGE CORPORATIONS UNDER THE BACKUP RULE

A. New York's Position

New York's position, at this stage of the proceedings, is as follows. First, New York takes exception to the Master's departure from the rule that under *Texas* the holder is the debtor. It agrees with us that the holders of the unclaimed property in this case fit the ordinary meaning of the word "debtor," that the state-law "debtor" should continue to be the "debtor" for purposes of the *Texas* rule,

---

fied Laws Ann. §43-41A-53 (Michie Supp. 1990) and adding S.D. Codified Laws Ann. § 43-41B-12); 1992 Utah Laws ch. 74, enacted March 12, 1992 (codified at Utah Code Ann. § 78-44-4.5 (Supp. 1992)); 1992 Wash. Laws ch. 48, enacted March 26, 1992 (to be codified between Wash. Rev. Code §§ 63.29.030 and 63.29.040); *see also* 1991 Alaska Sen. Concurrent Res. No. 40, 17th Legis., 2d Reg. Sess., introduced May 10, 1992 (proposing new Alaska Stat. § 34.45.130); 1991 Ill. H.B. No. 3126, 87th Gen. Assem., 1991-92 Reg. Sess., introduced March 31, 1992 (proposing to amend Ill. Rev. Stat. ch. 141, para. 108.2); 1991 Mo. H.B. No. 935, 86th Gen. Assem., 2d Reg. Sess., introduced Jan. 8, 1992 (proposing to amend Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992)); 1991 Pa. H.B. No. 2308, 175th Gen. Assem., 1991-92 Reg. Sess., introduced Jan. 21, 1992 (proposing new Pa. Stat. tit. 72, § 1301.2(a)(2)). For additional details, see Appendix C.

that the Master's rejection of state-law rules will create unnecessary hardship on businesses that have relied on the rule, and that *stare decisis* counsels against the Master's recommendation that the "issuer" be deemed the debtor. N.Y. Br. 49-71. Second, New York supports the Master's departure from the state of incorporation rule, without explanation and without acknowledgment of any *stare decisis* issues. N.Y. Br. 73. Third, New York asserts that it is entitled to all property at issue in this case, on the theory that (1) the entire dividend and interest "overage" escheat situation is caused by "floating" securities and (2) there is no way to know the owner of "floating" securities delivered out by the DTC or by New York bank custodians (thereby implicating the backup rule in New York's favor),[17] but (3) the identity of similar owners of similar "floating" securities delivered out by *brokers* [18] is ascertainable and leads—in every instance—to a New York address under the primary rule.

New York's position on the legal issues, like that of every state other than Delaware, has shifted. Where it originally supported the present rules, it now supports a change—but only one of the two changes proposed by the Master. Where it sees administrative difficulties and the unsettling of settled expectations in one rule change (the "state-law debtor as debtor" element of the *Texas* rule), it is mute as to the same problems in the other change (the "state of incorporation" element of the rule).[19] New York's position on these legal issues seems to be an alternative argument, designed as a fall-back position if its factual argument is rejected—as it should be. But New York offers the Court no reason why its particular per-

---

[17] The DTC and the banks are New York corporations (or national banks there headquartered) *and* apparently have their principal executive offices in New York.

[18] Many of which are incorporated in Delaware.

[19] Both rule changes raise administrative problems. *See* p. 11 n.7, *supra*.

mutation of these legal changes should be adopted. Instead of some basis in principle, its legal position seems to be based solely on the favorable outcome it would bestow on New York.

New York's primary defense is its factual assertion that brokers' overages (but not those of the DTC or the New York bank custodians) should pass to it under the primary rule because they are (it says) the property of known owners having last-known addresses in New York. This argument depends on a series of incorrect assumptions and leaps of faith, which the Master properly rejected.

B. New York's Factual Theory—The Problem of "Nominee Float"

New York's theory begins from the premise that there is only one source for unclaimed property in the hands of brokers—a phenomenon known as "nominee float." N.Y. Br. 30, 77. The "floating" security certificate is delivered out by Cede & Co. (the DTC's nominee), by a broker, or by a bank custodian, registered in its name (or the name of its nominee), and endorsed in blank. It thus functions as a bearer security, except that distributions on it will be paid to the record owner until some bearer presents it to the transfer agent for reregistration into its name.[29]

How this happens may be illustrated by an example. A broker ("Brokerage A") delivers out, either to customers or to counterparties to settle trades, ten certificates for 100 shares each of Ajax common stock during May

---

[29] In contrast to registered securities, bearer securities entitle the bearer to distributions based on presentment of a coupon or, sometimes, of the certificate itself. *See South Carolina* v. *Baker*, 485 U.S. 505, 508-09 (1988) (upholding Congress' limitations on the availability of favorable tax treatment for state-issued bearer bonds; Congress' action was based on the difficulties of identifying bearers); *see also* 7 William D. Hawkland, *et al.*, *UCC Series* § 8-102:03 at 29-30 (1990).

1992. The stock certificates are registered in Brokerage A's name and the certificates are endorsed in blank—that is, without the names of the transferees filled in—by Brokerage A.[21] Brokerage A has thus launched ten "floating" 100-share certificates of Ajax. The certificates, upon this delivery, belong to the persons or firms to which they were delivered or to whomever those persons or firms redeliver them to. The certificates can thus pass by delivery from hand to hand.[22] Because the security remains a registered security, as far as Ajax and its agents—the transfer agent and the dividend disbursing agent—are concerned, Brokerage A, which delivered the certificates out in May, remains the owner until reregistration has occurred. On June 15, 1992, the board of directors of Ajax declares a dividend of 33¢ a share to holders of record on June 30, 1992, payable on August 1, 1992. Unless whoever happens to be the bearer of one of the "floating" certificates submits it to Ajax's transfer agent for reregistration prior to June 30, 1992, the dividend payable on August 1, 1992, will be paid to Broker-

[21] A variant can be that the certificate is endorsed by Brokerage A not in blank but in favor of the party to whom it is delivered. However, that party will not necessarily submit it to the transfer agent for reregistration. It may cause the certificate to be redelivered to another party by attaching to it a "stock power" (instrument of transfer) signed by itself and with the assignee's name either left blank or inserted (in which case the assignee could repeat the process itself without reregistering the stock by redelivery with another stock power attached if necessary). *See, e.g.*, DeCesare Dep. 76-77; Shearer Dep. 96-97; *see generally* Egon Guttman, *Modern Securities Transfers* ¶ 7.01 (3d ed. 1987); 7 William D. Hawkland, *et al.*, *UCC Series*, § 8-308 (1990).

[22] The record discloses that brokerage houses often make delivery of securities by taking a certificate which they have received that is registered in the name of another broker and endorsed in blank by that broker and delivering it out in "good delivery" form, by delivering it "as is" if endorsed in blank or, if it is endorsed to them, by attaching their own stock power to it. *See* Principe Dep. 64-65; Shearer Dep. 96, 230-31; DeCesare Dep. 76-77; *see generally* materials cited at n.21, *supra*.

age A. However, according to the customs of the trade, whoever was the bearer-owner of the certificate on June 30, 1992, is entitled to the dividend. Shearer Dep. 182, 228-31, 425; DeCesare Dep. 445-47; Cirrito Dep. 133-34, 201-02.

Let us assume that seven of the ten Ajax certificates are reregistered by their bearers in their own names on or before June 30, 1992, and that three are not. The $99 dividend applicable to the three 100-share certificates not reregistered by June 30, 1992, will be paid to Brokerage A on August 1, 1992. If everything else is equal, this $99 will be an "overage" in the hands of Brokerage A. Cirrito Dep. 128-29, 133, 224-25; Principe Dep. 95-105; Shearer Dep. 94, 193-98. While Brokerage A will have a record of the entities that it delivered the ten Ajax certificates to in May 1992, it will have no knowledge of, and no way to learn from its own records, which of the ten certificates were still registered in Brokerage A's own name on June 30, 1992, or who happened to be the bearer-owner of those certificates on June 30, 1992.

In the case of Cede & Co. (the DTC's nominee) and the custodian banks, New York agrees that there is no way of DTC/Cede's knowing the identity of the bearer of a "floating" security at the time of a record date for a distribution of dividends or interest. New York admits that in the case of DTC (and presumably the banks) this is because the DTC "cannot track the movements" of the certificates once they have been launched upon the stream of commerce. N.Y. Br. 19. New York puts brokers in a different category, however. They, it claims, must be evaluated *not* on the basis of whether they have the ability to know who is the bearer of the "floating" security on a particular date, but whether they can ascertain from their records the identity of the counterparty to the trade that New York assumes caused the certificate to be launched. N.Y. Br. 81. New York asserts that DTC/Cede and the banks do not have that information, but brokers do.

While it is not possible to associate particular overages with particular deliveries of the security, New York says that all, or close to all, of the parties to whom Brokerage A delivered the "floating" certificates are other brokers. Since the launching broker does not know which brokers that it made delivery to were responsible for the overage, New York's theory is not that a particular broker can be identified, but that "brokers in general" statistically can be identified as the "owners" as of the record date. But how do we go about finding the address of "brokers in general?" New York has an easy answer. "Brokers in general" all have a "trading address" in New York, it says. N.Y. Br. 80. To be sure, a number of large brokerage houses have their headquarters in New York; but others have their headquarters elsewhere (Tucker Anthony, for example, has its headquarters in Boston);[23] and some regional brokerage houses do not even maintain branches in New York. However, New York's theory is that "virtually all" brokers have "trading addresses" not just in New York State but *in New York City*. N.Y. Br. 80. It implies that membership in the National Securities Clearing Corporation ("NSCC") somehow requires a New York trading address for "delivery of physical certificates." N.Y. Br. 80 n.59. Thus, says New York, "brokers in general" are the owners; and they all have addresses in New York!

This line of reasoning, New York says, justifies the supposed distinction that the "broker nominee float" overages are "owner/address *known*," while DTC and bank custodian "float" overages are not. N.Y. Br. 81. And, finally, New York claims to take the brokers' overages under the primary rule, which covers property of "known" but "lost" persons—even though brokers rarely become "lost" the way individuals do—because these hypothetical record-date bearer-owners of the certificates are part of a group, none of whose individual members are "lost" at

---

[23] *See* Principe Dep. 24, 27.

all, but all of whom have "trading addresses" in New York. N.Y. Br. 81.

New York does not contend that it has proven this factual theory of its case on the record. New York instead asks for a remand to the Master for further discovery. N.Y. Br. 81. But New York was warned that the Master's recommendation would "conclude consideration" of its theory and could result in "striking" its "defenses," and it was invited to make whatever kind of submission it deemed appropriate. Litigation Management Order No. 3, at 2 (Nov. 15, 1990). The existing record fully supports judgment against New York. And no further discovery could avail New York because, as we demonstrate below, New York's factual theory is not only contrary to the evidence, but it involves the proof of an impossibility. It is impossible for "Brokerage A" to know from its own books and records the identity of the bearer-owner of a "floating" security on the date that governs entitlement to a dividend or interest payment—the record date. Brokerage A will not know that identity unless and until the bearer-owner later comes forward and makes and supports a claim to Brokerage A, the record holder.[24]

---

[24] This is not to say that we agree with the Master that the *beneficial owner's* name and address must be shown in order for the primary rule to be invoked. The person who would properly make a claim to the record owner would be the *bearer-owner*, which might be an institutional or individual beneficial owner or might be a nominee, and hence not a beneficial owner. *See* Shearer Dep. 182, 228-31, 425; DeCesare Dep. 445-46; Cirrito Dep. 133-34, 201-03. But the Master's factual finding (Report 61 n.53) that a broker in the position of "Brokerage A" cannot identify the bearer-owner of a "floating" certificate on the record date of the distribution is supported by the record. *See* pp. 31-35, *infra*. New York has not come forward with evidence setting forth a genuine issue of material fact. *Cf.* Fed. R. Civ. P. 56(e).

Indeed, since it is irrational to assume that "Brokerage A" could have records showing who the bearer-owner was on the record date subsequent to its delivery of the certificate, or indeed which of the certificates it delivered out remained outstanding on

C. The Breaks in New York's Chain of Logic

New York's theory is wrong for five reasons. Those five reasons are all breaks in the chain of "logic" that New York must show in order to support its theory. A break in *any* of the five links would be enough to cause judgment to be entered against New York. On *all* five of them, New York's theory is not supported by the record; on all five, the evidence is contrary to New York's theory and supports the Master's finding. Indeed, on at least one of the five links, New York's theory is irrational—that is, there is no prospect that further discovery could establish New York's contention, since it is as irrational as a claim that the sun could be seen shining in the tropics at midnight.

1. *"Float" is not the only source of unclaimed property in this case.*—New York admits the existence of sources of overages other than "float," but asserts—without citation to evidence—that "automated accounting procedures and other control mechanisms detect these differences and correct them long before they become a meaningful source of escheatable funds." N.Y. Br. 20. New York was more candid with the Master, admitting that "there are a number of possible reasons for an overpayment" to a broker resulting in unclaimed property. New York's Renewed Motion for Judgment on the Pleadings, 44 (Oct. 30, 1990). New York's concession is confirmed by the record. For

---

that record date, it is impossible to say who was the bearer-owner of the particular certificate(s) that caused the overage. Indeed, one cannot say in what category of business, profession or humanity in general the bearer-owner on that day was; a stockbroker, a substantial individual investor, a pension fund, a foreigner, a mutual fund, or some other investor. To be sure, there are other entities' records which if carefully pieced together might enable one to trace this information (just as, presumably, no human being is ever really "lost"); but the books and records of the record owner—who has received the "overage"—will not yield the answer.

example, Senior Vice President Cirrito of Prudential-Bache Securities, Inc., testified that overages

> could result from a number of different reasons, one of which and the most clearly understood is from the perspective of a certificate being outstanding in your name. But there are processing errors, there are transactions that might not be posted on the exact date on which they occurred, and those errors can occur at Prudential-Bache. They could occur at counter-party organizations. They could occur at transfer agents.
>
> Transfer agents have been known, even though they give you a certificate on a particular day, to adjust their records in different time frames. So there are any number of reasons why you would wind up receiving monies that you really don't know what to do with.
>
> Q. I understand, and my point was it could be some combination of any one or all of those reasons, correct?
>
> A. Certainly.

Cirrito Dep. 224-25; *accord* Shearer Dep. 193-98, 423-24, 528-29; *see also* DeCesare Dep. 195-97. Indeed, the record reference cited by New York (N.Y. Br. 20) does not purport to say that the other causes for overages are correctable "long before they become a meaningful source of escheatable funds"; it simply says that "float" causes overpayments "to a large extent" or in "most" cases. DeCesare Dep. 353.

2. *"Floating" certificates are delivered by brokers to nonbrokers.*—New York's argument assumes that brokers deliver out "street name" endorsed securities only to their trading counterparties. The contention is, upon the record, false. All of the brokers whose representatives testified deliver out endorsed securities in street name to their institutional customers on the customers' request. *See* Principe Dep. 63-64, 66; Shearer Dep. 95-97; Cirrito Dep. 128-29. See page 18, *supra*, for a quotation of Principe's testimony. New York (N.Y. Br. 30 n.33) purports to cite

page 61 of the Principe deposition to the contrary. An examination of page 61 of the Principe deposition will show nothing at all relating to the subject.

Indeed, the proposition in New York's footnote 33—that "[t]he brokers also testified that they do not permit their customers to take possession of physical certificates registered in the broker's nominee name"—is supported by *none* of its record references and is affirmatively contrary to the record as to all three of the brokerages whose representatives testified. In addition to New York's miscitation of page 61 of the Principe deposition, the passages in the Shearer and Cirrito depositions cited by New York all discuss an entirely different subject: the occasions on which the brokers will hold in their own vaults physical certificates registered in their customers' names. Thus none of the passages cited in support of the proposition quoted supports it. Indeed, all three of the brokerage house witnesses testified that they did deliver out street name negotiable certificates registered in their firms' names to customers, though, to be sure, in the cases of Tucker Anthony and Merrill Lynch this was strictly confined to institutional customers, and in the case of Prudential-Bache, apparently largely so confined.[25] Since the assertion that the brokers deliver street name bearer securities only to their counterparties is an essential link in New York's argument—claimed to distinguish the brokers from DTC/Cede and the bank custodians—this triple, and universal, miscitation of the record is particularly striking.

3. *Particular "floating" certificates cannot be matched to overages.*—New York's argument, in order to be serious, must assume not only that broker's street name certificates are delivered only to other brokers but also that there will be a particular broker to whom certificates have been delivered who can be identified with each overage.

---

[25] *See* Shearer Dep. 95-97 (Merrill Lynch); Cirrito Dep. 128-29 (Prudential-Bache); Principe Dep. 63-64, 66 (Tucker Anthony) (quoted at p. 18, *supra*).

That, too, is not so. Even if "nominee float" were the only cause of unclaimed distributions—and the record shows it is not—there still may be any number of "floating" certificates that "Brokerage A" has launched for each issuer, as the example we have given above (pp. 24-26) illustrates. As Cirrito confirmed, an overpayment —even one based solely on the "float" problem—could reflect "a combination of 10 or 12 different certificates outstanding still registered in [Brokerage A's] name." Cirrito Dep. 225. And Brokerage A's records will not show which of the certificates that it launched were still "floating" on the record date and which had been reregistered.

4. *The bearer-owner's identity as of the record date cannot be ascertained from the delivering broker's records.*—Most critically, even if the launching broker, Brokerage A, could ascertain the precise certificate or certificates that caused the overage—and it cannot—there would still be no way for Brokerage A to ascertain the identity of the bearer-owner of the certificate on the record date for the distribution. As Director of Internal Control Principe of John Hancock Clearing Corporation [26] explained,

> [I]f I deliver the [endorsed certificate] out and it stays out, and the person I delivered it to doesn't bother reregistering it and maybe passes it along to somebody else . . . . I would be at a loss to explain who the beneficial owner of the security is at that point. If I got that cash dividend, I wouldn't know what to do with it.
>
> Q. Let us say that some time transpired and you escheated that overage. Tucker at that time does not have the name and address of the person entitled to the overage.
>
> A. That is correct.

Principe Dep. 102-03; *accord* Cirrito Dep. 221-22; Shearer Dep. 103, 108-09, 192-93; *see also* DeCesare Dep. 72-78, 116-19. Thus, all that is knowable, even assuming all

[26] An affiliate of the Tucker Anthony brokerage firm.

overages were caused by "float," is that at some point in time one or more certificates were delivered in negotiable form to someone, but that one or more of these certificates —which ones are unknown—had not been reregistered. Who owned them on the record date is unknowable from Brokerage A's records.

New York asserts that brokers are somehow different from the DTC and the bank custodians in this respect. N.Y. Br. 81. But the "floating" certificates are bearer instruments and pass from hand to hand whether they are launched by a bank, a broker or the DTC. New York admits that once DTC/Cede withdraws a certificate from DTC's vault and gives it to the participant registered in Cede's name and endorsed, "DTC has no control over these Cede certificates and no way of knowing who owns them on a record date." N.Y. Br. 25. New York gives no explanation of how a strockbroker would be any more able to identify the bearer-owner on the record date than is the DTC. Each knows of the *original* bearer; the records of all the launchers show the entity to whom they made delivery; but what that entity did with the certificate, or what its transferees did, and where that certificate was on the record date, are matters foreign to their knowledge.

New York claims that a broker (unlike a bank or the DTC) can ascertain from its books the identity of its counterparty to the *first* trade. N.Y. Br. 34, 81. This may not be so, since the delivery in question (if it could be identified) may have been made by the brokerage house to an institutional customer rather than to a counterparty, as indicated in point 2, above (pp. 30-31). But in any event, this merely shows that the broker can identify the *first* bearer. The fact that a certificate is delivered to a broker does not imply that it remains in that broker's, or any broker's, hands on the record date.

In order to deal with the breaks in its chain discussed in point 3 and in this point, New York develops

a statistical or generalized argument: it may not be known to Brokerage A which floating certificates among the many certificates it has launched are still outstanding, and not reregistered, on the record date. But, says New York, since the certificates were all delivered to brokers (a false premise, but let us continue) we know that the outstanding certificates, which caused the overage, are held by "brokers in general." The address of "brokers in general" is in New York City. Thus, the property is "owner/address known"—it is owned by "brokers in general" and the address of "brokers in general" is in New York City. (*See* point 5, below.)

But even if one ignores the record (including the triple miscitation by New York, *see* pp. 30-31, *supra*) and assumes that every certificate launched on a floating basis by a broker is originally delivered to another broker to settle a trade, it does not follow that those certificates are in the hands of those brokers, or any brokers, later on—on the record date for the dividend or interest distribution. The brokers could, to be sure, have redelivered the certificates to other domestic brokers; but they could have delivered them to foreign brokers, to institutional customers, or indeed to anyone. Not only the bearer-owner's specific identity, but its generalized identity (what class of occupation or other characteristics the bearer-owner has) on the record date are all unknown.[27] To say that the property in question is

---

[27] Brokers are not the only ones who find it impossible to reconstruct the identities of bearer-owners as of the record date. The IRS, too, recognized the impossibility of finding a paper trail to identify income derived from bearer securities (of which "floating" certificates are a close cousin) and therefore asked Congress to enact legislation requiring issuers of long-term bonds to issue them in registered (rather than bearer) form or face severe tax disadvantages. *See South Carolina* v. *Baker*, 485 U.S. 505, 508-09 (1988). Unlike the brokers, the IRS has the advantage of compulsory process. Moreover, the rubric of the back-up rule looks solely to what the debtor's (here, the overpaid broker's) own books and records show.

owned on a "owner known" basis when one does not know who the owner is, who its intermediate bearer predecessors in title were, or even what category of business it is in, is to do violence to language. No amount of additional evidence or proof could change this matter. It is epistemologically impossible for Brokerage A to know, from its own records, who the bearer-owners of the certificates that gave rise to the overage were on the record date.[28]

---

[28] We could make various arguments that the record affirmatively demonstrates (a) that brokers are *not* likely to be the bearer-owners of securities registered in someone else's name on the dividend or interest record date and (b) that the party to whom the *first* delivery is made is not likely to be the bearer-owner on the subsequent record date for the distribution. The brokerage house witnesses all testified that one could not tell from an examination of the trades in a particular security immediately prior to a record date who the owner of a distribution on that security which was an "overage" might be. Cirrito Dep. 222-23; Principe Dep. 211-12; Shearer Dep. 527-28. The broker witnesses also testified that when their firms received a certificate that they were planning to keep, they caused it to be reregistered in their own names as quickly as possible. Principe Dep. 62-63, 214; Cirrito Dep. 40, 42; Shearer Dep. 68-69, 99-100. This supports an inference that the certificates which "float" are likely to have passed through several hands by a record date. New York asserts (N.Y. Br. 32-34) that with a little extra effort, the delivering broker (Brokerage A) could find the pertinent bearer-owners as of the record date. But the record also reflects that broker creditors were extremely diligent in making claims on other brokers in underage situations. *See* Principe Dep. 117; Cirrito Dep. 76-78; Shearer Dep. 145-46, 221-22 ("[w]e attempt to get every dollar that we're entitled to"), 234-35. If the broker debtors could, with some effort, find the broker creditors, why couldn't the broker creditors find the broker debtors? There would certainly be more incentive for them to do so, and it would be easy; they could do so by looking to see the name in which their bearer certificates were registered, which appears on the certificate's face. This and the practice of immediate reregistration by brokers of securities they plan to keep both suggest probable bearer ownership by *nonbrokers* on the record date in cases where no claim was made in the three-year period.

But none of these points, all of which lead us in the other direction from where New York wants to go, needs be pursued. The short

5. Many brokers cannot be said to have New York addresses.—After assuming that the record-date bearer-owners are all "brokers in general," New York must also assume that *every* broker is a "New York broker."[29] New York's position in this respect has evolved: originally, it asserted only that a "significant number" of brokers had "New York trading addresses." N.Y. Br. in Opp. to Motion for Leave to File Complaint, 7 (May 9, 1988). Later, it said that "most, if not all," brokers have New York trading addresses, based on their membership in the NSCC. N.Y. Renewed Motion for Judgment on the Pleadings, 50 & n.92 (Oct. 30, 1990). New York also asserted that it is reasonable to *presume* that "most" brokers deliver certificates to other brokers. N.Y. Motion for Judgment on the Pleadings, 52. New York now recognizes that the presumption it sought is impermissible, and therefore asserts only that it is less expensive to use "statistical samplings," but that it can demonstrate that "virtually all" brokers have "New York addresses." N.Y. Br. 80. Its argument, of course, is contrary to the holding in *Pennsylvania* v. *New York*, 407 U.S. at 214, rejecting a presumption based on the place of purchase of money orders.

An alternative argument by New York appears to be that physical delivery of securities certificates by the NSCC must take place in New York City, and therefore (since "most, if not all" brokers have NSCC New York trading addresses) that a "delivery ticket" will reflect a "New York address." N.Y. Br. 19, 34, 80 n.59. New York has referred to this address as the "trading address," which it suggests is governing as the "last-

---

answer is that the record owners' books and records offer no basis whatsoever from which could be inferred the identiy of the bearer-owner of a street-name negotiable security on a record date subsequent to the security's delivery.

[29] *See* N.Y. Br. 80. New York nowhere defines the term.

known address" under the primary rule. It is true that the NSCC requires its members to specify *some* location where they can receive physical delivery of envelopes containing securities, tickets relating to securities, and other items. *See* NSCC, *Rules & Procedures*, Rule 9 (filed with the SEC as Exhibit E to the NSCC's form CA-1). But the NSCC will deliver such envelopes to its members not only in New York (Rule 9, § 1), but in any city where it has a branch office (Rule 9, § 2). The NSCC has *no* requirement that its members have a "New York" address of any kind. And, as *amici* explained, regional and small brokerage firms make up by far the larger number of brokers. SIA *Amici* Br. 14. But even if such firms *did* take delivery only in New York (and they do not), a New York "trading address" is hardly the "last known address of the creditor, as shown by the debtor's books and records," which the *Texas* case makes part of the primary rule. 379 U.S. at 682. Indeed, generally speaking, brokerage firms do not become "lost," and real addresses, many of them outside of New York, are available for all of them. That the owner is "known" and has a "last-known address" on the debtor's books and records, but is "lost" is the prerequisite for the primary rule. The brokers are not "known" but "lost"; the identity of the bearer-owner is unknown; if it were a broker, the broker would not be "lost"!

Every one of the five links in New York's chain is defective and as to many of the links no further making of a record, even if permissible, could repair the problem. Fundamentally, the identity of the bearer-owner of the securities on the record date is unknown and unknowable as far as the records of the original delivering broker show. A presumption that the bearer certificates giving rise to overages are held by "brokers in general" on the record date is factually insupportable and there is no way that this could be proved even on a statistical basis from the original records of the delivering broker. And even if

statistical proof of it were permissible (contrary to the *Pennsylvania* rule) and available, proof that the certificates were bearer-owned by "brokers in general" does not make them "owner known" any more than proof that an insurance company's unidentifiable funds were owned by "policyholders in general" would make them "owner known." It simply proves that the particular owner is unknown, and that the property is escheatable under the backup rule.

In short, New York's factual argument depends on a series of misconstructions of the record and arguments in favor of the impossible. No expansion of the record could result in its proving all of the links in the argument which it must prove to make its case. Judgment should be entered against New York in favor of Delaware.

CONCLUSION

For the reasons stated in Delaware's "Exceptions and Brief in Support" filed May 26, 1992, and herein, Delaware's Exceptions to the Report of the Special Master should be sustained and judgment should be entered against the Intervenors and in favor of Delaware against New York, in the form of decree attached as Appendix F to our brief filed May 26, 1992.[30]

---

[30] We note that the presentations of their cases in support of the Master's Report by the Alabama subgroup and the Arizona subgroup of the Texas group are being filed simultaneously with this Brief, and of course we have not had an opportunity to respond to them herein. Delaware may accordingly seek this Court's indulgence in a reply brief if there are any arguments in those briefs which we did not fully anticipate in our May 26, 1992 brief.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Plaintiff,
State of Delaware

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

July 1992

APPENDIX A

SCORECARD OF POSITIONS

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Alabama								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase[1]	X			X	X			X
Alaska								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Arizona								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								

[1] Includes all Exceptions and Statements filed in Exceptions round.

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Arkansas								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
California								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X			X
Colorado								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Connecticut								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Delaware								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report		X	X			X		X
3. Before the Master, Following Draft Report		X	X			X		X
4. Before this Court in "Exceptions" Phase		X	X			X		X
D.C.								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report[2]	X	X	X	X		X	X	X
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	

[2] D.C. changed position during this Phase, first advocating issuer-as-debtor and state of incorporation as domicile; and then rejecting those positions in favor of free-form "equitable allocation."

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Florida								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Georgia								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Hawaii								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Idaho								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Illinois								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Indiana								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Iowa								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Kansas								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Kentucky								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Louisiana								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Maine								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Maryland								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Massachusetts								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	NA	NA	NA	NA	NA	NA	NA	NA
3. Before the Master, Following Draft Report	NA	NA	NA	NA	NA	NA	NA	NA
4. Before this Court in "Exceptions" Phase		X		X		X		X
Michigan								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	
Minnesota								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Mississippi								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Missouri								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Montana								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Nebraska								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X		X	
Nevada								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
New Hampshire								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
New Jersey								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
New Mexico								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
New York								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report		X	X			X		X
3. Before the Master, Following Draft Report		X	X			X		X
4. Before this Court in "Exceptions" Phase		X		X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
North Carolina								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
North Dakota								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Ohio								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Oklahoma								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Oregon								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	NA	NA	NA	NA	NA	NA	NA	NA
3. Before the Master, Following Draft Report[3]	X		X	X	X	X		X
4. Before this Court in "Exceptions" Phase								
Pennsylvania								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

[3] Oregon moved to intervene after the Master's Report, and its motion to intervene adopted the original Texas group's position; it changed its position thereafter.

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Rhode Island								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report		X		X		X	X	
3. Before the Master, Following Draft Report	X			X	X		X	
4. Before this Court in "Exceptions" Phase	X			X	X			X
South Carolina								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
South Dakota								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Tennessee								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Texas								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Utah								
1. Prior to Appointment of Master		X	X			X		X
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
Vermont								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Virginia								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Washington								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

STATE	Advocated issuer as debtor		Advocated state of incorporation as domicile		Advocated state of principal executive office as domicile		Advocated free-form "equitable allocation"	
	YES	NO	YES	NO	YES	NO	YES	NO
West Virginia								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X
Wisconsin								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase								
Wyoming								
1. Prior to Appointment of Master	NA	NA	NA	NA	NA	NA	NA	NA
2. Before the Master, Prior to Draft Report	X		X			X		X
3. Before the Master, Following Draft Report	X			X	X			X
4. Before this Court in "Exceptions" Phase	X			X	X			X

APPENDIX B

FIRST ROUND LITIGATING-POSITION STATUTES

The 1990 and 1991 statutes almost all have nearly identical operative provisions. Arkansas' is provided as an example:

> All intangible property, including, but not limited to, any interest, dividend, or other earnings thereon, less any lawful charges, held by a business association, federal, state, or local government, or governmental subdivision, agency, or entity, or any other person or entity, regardless of where the holder may be found, if the owner has not claimed or corresponded in writing concerning the property within three (3) years after the date prescribed for payment or delivery, is presumed abandoned and subject to the custody of this state as unclaimed property if:
>
> (1) The last known address of the owner is unknown; and
>
> (2) The person or entity originating or issuing the intangible property is this state or any political subdivision of this state, is incorporated, organized, or created in this state.

The following table shows the date each state with one of the 1990 or 1991 statutes moved to intervene in this action, along with the date it enacted the statute in question:

State	Date of Motion	Statutory Information
Alabama	April 21, 1989	1991 Ala. Act No. 577, enacted July 29, 1991 (codified at Ala. Code § 35-12-50 (Michie 1991))
Alaska	October 29, 1990	1991 Alaska H.B. No. 240, 17th Legis., 2d Reg. Sess. (introduced March 27, 1991; not enacted)
Arkansas	November 17, 1989	1991 Ark. Act No. 1245, enacted April 17, 1991 (codified at Ark. Code Ann. § 18-28-208(b) (Michie Supp. 1991))
Florida	November 17, 1989	1990 Fla. Laws ch. 113, enacted June 21, 1990 (codified at Fla. Stat. Ann. § 717.1035 (West Supp. 1992))
Hawaii	April 21, 1989	1990 Haw. Sess. Laws ch. 31, enacted April 23, 1990 (codified at Haw. Rev. Stat. § 523A-2.5 (Supp. 1991))
Illinois	April 21, 1989	1991 Ill. Law No. 206, enacted Sept. 3, 1991 (codified at Ill. Ann. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992))
Indiana	April 21, 1989	1991 Ind. Act No. 204, enacted July 1, 1991 (codified at Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992))
Iowa	November 17, 1989	1990 Iowa Acts ch. 1095, enacted March 29, 1990 (codified at Iowa Code Ann. § 556.9A (West Supp. 1992))
Kansas	April 21, 1989	1990 Kan. Sess. Laws ch. 196, enacted April 26, 1990 (codified at Kan. Stat. Ann. § 58-3933 (Supp. 1991))
Louisiana	April 21, 1989	1991 La. Act No. 209, enacted July 2, 1991 (codified at La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992))

State	Date of Motion	Statutory Information
Mississippi	November 17, 1989	1991 Miss. Laws ch. 451, § 7, enacted March 26, 1991 (codified at Miss. Code Ann. § 89-12-14 (1991))
Missouri	November 17, 1989	1990 Mo. Laws, H.B. No. 1052, enacted July 9, 1990 (codified at Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992))
Montana	April 21, 1989	1991 Mont. Laws ch. 654, enacted April 26, 1991 (codified at Mont. Code Ann. § 70-9-210 (1991))
Nevada	April 21, 1989	1991 Nev. Stat. ch. 149, § 1, p. 287, enacted May 7, 1991 (codified at Nev. Rev. Stat. Ann. § 120A.225 (Michie Supp. 1991))
New Hampshire	November 17, 1989	1990 N.H. Laws ch. 105, § 13, enacted April 13, 1990 (codified at N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991))
North Dakota	July 16, 1990	1991 N.D. Laws ch. 492, enacted March 19, 1991 (codified at N.D. Cent. Code § 47-30.1-03.1 (Michie Supp. 1991))
Oklahoma	April 21, 1989	1991 Okla. Sess. Laws ch. 331, § 19, enacted June 15, 1991 (codified at Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992))
South Dakota	April 21, 1989	1990 S.D. Laws ch. 352, enacted March 12, 1990 (codified at S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990))
Utah	April 21, 1989	1990 Utah Laws ch. 179, enacted March 9, 1990 (codified at Utah Code Ann. § 78-44-4.5 (1992))
West Virginia	November 17, 1989	1990 W. Va. Acts ch. 184, enacted March 14, 1990 (codified at W. Va. Code Ann. § 36-8-8a (Michie Supp. 1992))

APPENDIX C

SECOND ROUND LITIGATING-POSITION STATUTES

The 1992 statutes contain almost the same provisions as the 1990 and 1991 statutes, except that the language "or otherwise located" is generally added to the final operative paragraph. Again, Arkansas' 1992 revision (with new language emphasized) serves as an example:

> All intangible property, including, but not limited to, any interest, dividend, or other earnings thereon, less any lawful charges, held by a business association, federal, state, or local government, or governmental subdivision, agency, or entity, or any other person or entity, regardless of where the holder may be found, if the owner has not claimed or corresponded in writing concerning the property within three (3) years after the date prescribed for payment or delivery, is presumed abandoned and subject to the custody of this state as unclaimed property if:
>
> (1) The last known address of the owner is unknown; and
>
> (2) The person or entity originating or issuing the intangible property is this state or any political subdivision of this state, or is incorporated, organized, created *or otherwise located* in this state.

(Emphasis shows new material.)

The following table shows the date each state with one of the 1992 statutes or bills moved to intervene in this action, along with the date it enacted the statute in question (or the date of the bill's introduction) and whether the statute is amendatory of a 1990 or 1991 statute.[1]

---

[1] Due to the volume of this very recent legislative activity, our table may not be complete.

State	Date of Motion	Statutory Information
Alaska	October 29, 1990	1991 Alaska Sen. Concurrent Res. No. 40, 17th Legis., 2d Reg. Sess., introduced May 10, 1992 (proposing new Alaska Stat. § 34.45.130)
Arkansas	November 17, 1989	1992 Ark. Act No. 7, enacted Feb. 27, 1992 (amending 1991 Act, Ark. Code Ann. § 18-28-208 (Michie Supp. 1991))
Florida	November 17, 1989	1992 Fla. Acts ch. 169, § 2, 1992 Fla. Sess. Law Serv. 1371, 1372 (West), enacted April 9, 1992 (amending 1990 Act, Fla. Stat. Ann. § 717.1035 (West Supp. 1992))
Georgia	June 3, 1990	1992 Ga. Law No. 979, § 7, enacted April 13, 1992 (adding Ga. Code Ann. § 44-12-201)
Hawaii	April 21, 1989	1992 Haw. Sess. Laws ch. 133, enacted June 3, 1992 (amending 1990 Act, Haw. Rev. Stat. § 523A-2.5 (Supp. 1991))
Illinois	April 21, 1989	1991 Ill. H.B. No. 3126, 87th Gen. Assem., 1991-92 Reg. Sess., introduced March 31, 1992 (proposing to amend 1991 Act, Ill. Rev. Stat. ch. 141, para. 108.2 (Smith-Hurd Supp. 1992))
Indiana	April 21, 1989	1992 Ind. Act No. 135, enacted Feb. 21, 1992 (amending 1991 Act, Ind. Code Ann. § 32-9-1-10.5 (Burns Supp. 1992) and codified in Burns Supp. 1992))
Iowa	November 17, 1989	1992 Iowa Acts ch. 1038 (S.F. No. 2174), 1992 Iowa Legis. Serv. 76, 77 (West), enacted April 9, 1992 (amending 1990 Act, Iowa Code Ann. § 556.9A (West Supp. 1992))

State	Date of Motion	Statutory Information
Kansas	April 21, 1989	1992 Kan. Sess. Laws ch. 36, enacted April 16, 1992 (amending 1990 Act, Kan. Stat. Ann. § 58-3933 (Supp. 1991))
Louisiana	April 21, 1989	1992 La. Act No. 73, enacted June 5, 1992 (amending 1991 Act, La. Rev. Stat. Ann. § 9:154(3)(c) (West Supp. 1992))
Maine	June 3, 1991	1992 Me. Acts ch. 756, enacted March 27, 1992 (adding Me. Rev. Stat. Ann. tit. 33, § 1811-A)
Mississippi	November 17, 1989	1992 Miss. Laws ch. 408, enacted April 27, 1992 (amending 1991 Act, Miss. Code Ann. § 89-12-14)
Missouri	November 17, 1989	1991 Mo. H.B. No. 935, 86th Gen. Assem., 2d Reg. Sess., introduced Jan. 8, 1992 (proposing to amend 1990 Act, Mo. Ann. Stat. § 447.533 (Vernon Supp. 1992))
New Hampshire	November 17, 1989	1992 N.H. Laws ch. 289, § 51, enacted June 17, 1992 (amending 1990 Act, N.H. Rev. Stat. Ann. § 471-C:3-a (Supp. 1991))
Oklahoma	April 21, 1989	1992 Okla. Sess. Laws ch. 295, § 27, enacted May 26, 1992 (adding Okla. Stat. Ann. tit. 60, § 657.4, without mentioning 1991 Act, Okla. Stat. Ann. tit. 60, § 659.1 (West Supp. 1992))
Pennsylvania	April 21, 1989	1991 Pa. H.B. No. 2308, 175th Gen. Assem., 1991-92 Reg. Sess., introduced Jan. 21, 1992 (proposing to add new Pa. Stat. § 1301.2(a)(2))

State	Date of Motion	Statutory Information
South Dakota	April 21, 1989	1992 S.D. Laws ch. 312, § 11A, enacted March 10, 1992 (replacing 1990 Act, S.D. Codified Laws Ann. § 43-41A-53 (Michie Supp. 1990), with S.D. Codified Laws Ann. § 43-41B-12)
Utah	April 21, 1989	1992 Utah Laws ch. 74, enacted March 12, 1992 (amending 1990 Act, Utah Code Ann. § 78-44-4.5 (1992) and codified in Supp. 1992)
Washington	April 21, 1989	1992 Wash. Laws ch. 48, enacted March 26, 1992 (to be codified between Wash. Rev. Code §§ 63.29.030 and 63.29.040)

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

ON THE REPORT OF THE SPECIAL MASTER DATED JANUARY 28, 1992

REPLY OF THE STATES OF MICHIGAN, MARYLAND, AND NEBRASKA, AND THE DISTRICT OF COLUMBIA TO THE EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK TO THE REPORT OF THE SPECIAL MASTER

James F. Flug*
Lee E. Helfrich
Martin Lobel
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W., Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan, Frank J. Kelley, Attorney General, and Maryland, J. Joseph Curran, Jr., Attorney General

* Counsel of Record
(continued on inside cover)

John Payton
Corporation Counsel
Charles L. Reischel
Deputy Corporation
Counsel
Lutz Alexander Prager
Assistant Deputy
Corporation Counsel
District Building, Rm. 305
Washington, D.C. 20004
(202) 727-6252

Attorneys for the District of Columbia

Don Stenberg
Attorney General
Dale A. Comer
Assistant Attorney
General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2940

Attorneys for the State of Nebraska

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION AND SUMMARY OF REPLY . . . 1

ARGUMENT 4

I. IT IS THE COURT'S RESPONSIBILITY TO ACHIEVE EQUITY AMONG THE STATES 4

A. Under the Constitution, The Court Has Primary And Unique Authority To Resolve This Dispute Among The States 4

B. The Court Should Not Abdicate Its Primary Role Merely Because Congress May Have The Power To Rectify An Inequitable Result 8

1. Congress Does Not Have And Has Not Exercised General Jurisdiction Over State Unclaimed Property Issues 8

2. In Enacting 12 U.S.C. §§ 2501-2503, Congress Confirmed That the Court Should Supplement The Rules of *Texas v. New Jersey* Where Equity Requires. 11

II. THE "LAW" OF *TEXAS V. NEW JERSEY* PRECLUDES APPLICATION OF THE OLD BACKUP RULE HERE, AND REQUIRES ADOPTION OF AN EQUITABLE SOLUTION. 16

A. *Texas v. New Jersey* Makes Clear That Equity Is the Court's Overriding Principle and That Only Insubstantial Departures From That Standard Will be Tolerated to Achieve Convenience 17

B. The Underlying Principles of *Texas v. New Jersey* Control Here Since That Case's Rules of Convenience Did Not Address the Circumstances of This Case. 19

C. *Pennsylvania v. New York*, Even if Binding, Would Not Require Use of the Old Backup Rule Here 22

III. THE FACTUAL ARGUMENTS OF DELAWARE AND NEW YORK PROVIDE NO JUSTIFICATION FOR GRANTING THEM DISPROPORTIONATE SHARES OF THE FUNDS AT ISSUE 24

A. The State of Incorporation Is Not the State Where the Relevant Commercial Activities Occurred. . 24

B. New York's "Creditor-Broker" Theory Is Unsupported By Logic Or Evidence 28

1. The Record Establishes That The Unknown Owners Are Likely To Be Brokers' Customers In All The States Rather Than Brokers In New York. 28

2. Nothing In The Record Supports New York's Assertion That A Creditor, Even a "Creditor-Broker," Can Be Identified Solely From Review Of A Holder's Books and Records. 33

IV. UNDER THE APPROACH SUGGESTED HERE, THE COURT WOULD NOT OVERRULE ANY PRECEDENT, NOR WOULD ANY STATE'S REASONABLE EXPECTATIONS BE FRUSTRATED; THUS THERE IS NO RETROACTIVITY ISSUE. 36

CONCLUSION 42

TABLE OF AUTHORITIES

Cases

American Loan & Trust Co. v. Grand Rivers Co., 159 F. 775 (W.D. Ky. 1908) 7

Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 7

Ashland Oil, Inc. v. Caryl, 497 U.S. 916 (1990). . 37, 41

Chevron Oil Co. v. Husen, 404 U.S. 97 (1971) . . . 37, 41

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) . . . 9

Connecticut Mutual Life Insurance Co. v. Moore, 333 U.S. 541 (1948) 25

Connecticut v. Massachusetts, 282 U.S. 660 (1931) . 5, 14

CTS Corp. v. Dynamics Corporation of America, 481 U.S. 69 (1987) 27

Delaware v. New York, 486 U.S. 1030 (1988) 9

Eli Lilly and Co. v. Medtronic, Inc., 872 F.2d 402 (Fed. Cir. 1989), *aff'd*, 496 U.S. 661 (1990) 14

Funk v. United States, 290 U.S. 371 (1933) 8

Georgia v. Pennsylvania Railroad Co., 324 U.S. 439 (1945) 5

Hecht Co. v. Bowles, 321 U.S. 321 (1944) 6, 7

Hodgson v. Wheaton Glass Co., 446 F.2d 527 (3d Cir. 1971) 6

Holmberg v. Armbrecht, 327 U.S. 392 (1946) 7

Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983) 6

In Re Moneys Deposited, 243 F.2d 443 (3d Cir. 1957) . 6

James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 37

Johnson v. United States, 163 F. 30 (1st Cir. 1908) . . . 14

Kansas v. Colorado, 206 U.S. 46 (1907) 5, 8, 9

Kentucky v. Indiana, 281 U.S. 163 (1930) 9

Maryland v. Louisiana, 451 U.S. 725 (1981) 6, 9

Mitchell v. De Mario Jewelry Inc., 361 U.S. 288 (1960) 7, 14

Moragne v. States Marine Line Inc., 398 U.S. 375 (1970) 14

Nebraska v. Wyoming, 325 U.S. 589 (1945) 9

New Jersey v. Chubb Corp., 570 A.2d 1313 (N.J. Super. 1989) 38

New York v. United States, 60 U.S.L.W. 4603 (U.S. June 19, 1992) 9

O'Connor v. Sperry & Hutchinson Co., 379 A.2d 1378 (Pa. Commw. Ct. 1977), *aff'd*, 412 A.2d 539 (Pa. 1980) 15, 38

Panhandle Eastern Pipe Line Co. v. FPC, 179 F.2d 896 (8th

Cir. 1949) 7

Paul v. Davis, 424 U.S. 693 (1976) 6

Pennsylvania v. New York, 407 U.S. 206 (1972) . . *Passim*

Quill Corp. v. North Dakota, 60 U.S.L.W. 4423 (U.S. May 26, 1992) 11

Standard Oil Co. v. New Jersey, 341 U.S. 428 (1951) . 25

State v. Liquidating Trustees of Republic Petroleum Co., 510 S.W.2d 311 (Tex. 1974) 16

Texas v. New Jersey, 379 U.S. 674 (1965) . . . . . *Passim*

Union Pacific Railway Co. v. Chicago, Rock Island, & Pacific Railway Co., 163 U.S. 564 (1896) 7

United States v. Fausto, 484 U.S. 439 (1988) 14

United States v. Hutcheson, 312 U.S. 219 (1941) 14

United States v. Klein, 303 U.S. 276 (1938) 7

United States v. Oregon, 366 U.S. 643 (1961) 10

Constitutions

U.S. CONST. art. I, § 8 9

U.S. CONST. art. I, § 10 8

U.S. CONST. art. III, § 2 4

Statutes and Regulations

5 U.S.C. § 8705(d) (1967) 10

12 U.S.C. §§ 2501-2503 (1974) 8, 10, 11, 12, 13

25 U.S.C. § 375d (1983) 10

26 U.S.C. § 6408 (1989) 10

31 U.S.C. § 1322 (1983) 10

38 U.S.C. § 1970(h) (1991) 10

Other Authorities

120 Cong. Rec 4528 (1974) 12, 13

120 CONG. REC. 4673 (1974) 10, 12, 13

L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1988) . . . 6

Memorandum of State Executive Department Division of Budget, "Unclaimed Property - Simplifying Administration," 1980 New York Laws 1710 39

National Assn. of Unclaimed Property Administors, NAUPA Unclaimed Property Statistics (For year ending 6-30-90) 28

N.Y. ABAND. PROP. LAWS, Art. III, § 300(4) 38

S. REP. NO. 93-505, 93d Cong., 1st Sess. 3 (1973) . . . 12

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

REPLY OF THE STATES OF MICHIGAN, MARYLAND, AND NEBRASKA, AND THE DISTRICT OF COLUMBIA TO THE EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK TO THE REPORT OF THE SPECIAL MASTER

INTRODUCTION AND SUMMARY OF REPLY

In original actions the Court is vested with the broadest constitutional authority -- and responsibility -- to resolve disputes among the states. Especially in the field of unclaimed property, a field of historic state competence where Congress has no general mandate to act, the Court is the primary source of law when states disagree, acting as a court of equity to resolve their controversies.

The Master and the Undersigned States have each proposed that the Court exercise its authority to provide a fair

and convenient resolution to this unique case. The Master proposes a result derived from the backup "rule of convenience" adopted in 1965. The Undersigned States accept this proposal, but suggest that it can be adopted on a more straightforward basis than that suggested by the Master. In the event that the Court declines to accept the Master's result, the Undersigned States have proposed an "equitable allocation" approach that also provides an equitable and convenient resolution.

The essence of the Exceptions of Delaware and New York to the Special Master's Report is that the Court does not have the capacity to adopt a remedy to suit this case. Their position is that the two specific rules of convenience adopted 27 years ago to administer the $27,000 worth of mostly address-known property at issue in *Texas v. New Jersey*, 379 U.S. 674 (1965), forever occupy the entire field of unclaimed intangibles. They argue that in every case the Court must choose between its "primary" rule, devised as a fair and convenient method of allocating property owed to identified owners with known addresses, and its "backup" or "clean-up" rule, adopted solely as a matter of convenience (regardless of inequity) to cover "infrequent" instances of residual amounts of property owed to persons with no known address. Under the Delaware view, the Court must apply one of these mechanical tools, without any variation for any reason, in every case -- no matter how large or how different from *Texas v. New Jersey* -- including this case involving hundreds of millions of dollars of property as to which there are not only no addresses whatsoever, but no identified owners. New York appears willing to accept selected modifications of the rules, but only if they assist New York.

Despite the fact that the funds at issue actually belong to unidentifiable beneficial owners located in all the states, New York and Delaware would have the Court interpret its previous rules to send the lion's share of the funds to Delaware and/or New York, at the expense of the other states.

They say the Court is bound to do so because, once before, when faced with a request to vary its rule to achieve equity, it declined to do so. *Pennsylvania v. New York*, 407 U.S. 206 (1972).

Congress reversed the result in that case, however, accepting the position of the three dissenting Justices that reflexive adherence to the mechanical rules adopted for a factually different case would violate the equitable principles on which the rules were based. Rather than accepting this Congressional insight as the basis for resolving the even more distinguishable case here, New York and Delaware would require the Court to choose the *in*equitable course again so as to elicit a Congressionally imposed equitable solution.

Nothing in the Court's institutional relationship with Congress requires such a cession of authority. On the contrary, both the strength of the Court's authority in matters of original jurisdiction, and the historical limitation of Congressional action in the field of unclaimed property to situations where state escheat power intersects with specific federal functions, militate toward full exercise of the Court's responsibility to do equity here, and to "mould each decree" to fit the circumstances. Especially on the facts here, where the Court's original principles require supplementation of its original rules of thumb to cover a situation not comprehended by those rules, the Court is not only free to elaborate upon its past work, but is required to do so if its own institutional credibility is to be maintained.

The Court, therefore, can and must go beyond the *Texas v. New Jersey* rules of convenience to cover the present circumstances, maximizing equity to the extent practicable, but permitting rough equity where convenience and clarity require. The Court can adopt the Special Master's alternative, or the equitable allocation approach, without regard to whether they fit within the words of the 1965 rules of convenience, as long as the option chosen fits within the basic principle of

Texas v. New Jersey: *fairness among the states through an allocation that reflects their shares of the commercial activities relevant to the unclaimed property.*

In thus filling a gap in the original rules of convenience, the Court avoids any problems of *stare decisis* or of retroactivity. Application of the "primary" last-known-address rule in its own terms is impossible here, where there are no known owners or addresses. Large scale application of the state of incorporation "clean-up" rule would produce an inequitable result specifically proscribed by the Court. Consistency and fairness thus require, rather than preclude, the application to this case of a supplemental rule based on the Court's original equitable principles.

ARGUMENT

I. IT IS THE COURT'S RESPONSIBILITY TO ACHIEVE EQUITY AMONG THE STATES

A. Under the Constitution, The Court Has Primary And Unique Authority To Resolve This Dispute Among The States

Delaware repeatedly asserts that the Court should not revisit, modify or presumably even clarify its own case law, but should leave it to Congress to resolve exceptional cases. Exceptions and Brief in Support For Plaintiff, State of Delaware, No. 111 Orig., 52, 61, 71, 73, 76 (May 1992) (hereinafter "Del. Br."). Delaware's remarkable theory -- under which once the Court decides an issue, no further elucidation is permitted except by Congress -- demeans the Court's separate and primary constitutional role in original actions and reveals a misunderstanding of the process for judicial development of federal law.

As a matter of constitutional assignment of authority to the separate branches, the Court, under Art. III, § 2, has a

direct and "unrestricted ... general grant" of power to decide controversies between the states. *Kansas v. Colorado*, 206 U.S. 46, 82 (1907). Once the Court's original jurisdiction is properly invoked, its authority over the controversy is without limitation. Such broad authority was deemed particularly necessary with regard to controversies between states because the framers wanted to structure an impartial forum for the peaceful resolution of state disputes, which historically had led to disruptive, armed conflicts born of sovereign partisanship. *Georgia v. Pennsylvania Railroad Co.*, 324 U.S. 439, 450 (1945). In entering the Union, and signing the Constitution, the states ceded as much of their sovereignty as would be necessary for the Court's exercise of jurisdiction. "All the states have transferred the decision of their controversies to this court; *each had a right to demand of it the exercise of power which they had made judicial* by the Confederation of 1781 and 1788; that we should do that which neither states nor Congress could do, -- settle the controversies between them." *Kansas v. Colorado*, 206 U.S. at 84 (internal quotation, citation omitted, emphasis supplied). The Court was deliberately selected as the forum for the resolution of state conflicts, rather than Congress, which was the forum under the Articles of Confederation. *Id.*

In *Texas v. New Jersey*, the Court exercised its "unrestricted ... general grant" of power, recognizing that in the uniquely non-federal area of state escheat, it was responsible for developing and applying the principles for resolving conflicting state claims. 379 U.S. at 677. The Court chose as its guide fundamental notions of equity. *Id.* at 680-681, 683. This choice flowed naturally from the Court's prior original action cases involving other traditional areas of state power, such as water rights. In those cases, the Court recognized that the best means for accommodating the competing interests of independent state sovereigns was through the flexible and sensitive tool of equity. *See, e.g.*, *Connecticut v. Massachusetts*, 282 U.S. 660, 670-671 (1931).

See also Hecht Co. v. Bowles, 321 U.S. 321, 329 (1944) ("[f]lexibility rather than rigidity has distinguished" equity; "[t]he qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation ...").[1]

Here too, the Court is faced with a dispute over an area of law and sovereign power that has historically been viewed as resting with the states.[2] The power of escheat has consistently been seen as an attribute of state, not federal, sovereignty.[3] Delaware's list of Congressional enactments on

---

[1] Arguably, original jurisdiction -- viewed as a particular aspect of the "checks and balances" design for preservation of the federal system, including the role of independent states -- is an expression of a hesitancy to have the equitable interests of sovereign states adjudicated by a political body, whose constitutionally limited focus is to define and legislate federal interests. *Cf. Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983); *Maryland v. Louisiana*, 451 U.S. 725, 743 (1981) (noting that "unique concerns of federalism" form "the basis of ... original jurisdiction").

[2] Indeed, Delaware avidly contends that "traditional state interests -- such as property rights or the regulation of corporations" are at their "apex" here. Del. Br., 48. *See also id.* at 45, 47, 55. It goes so far as to analogize this case to cases such as *Paul v. Davis*, 424 U.S. 693 (1976), Del. Br., 47, which scholars believe to form the case law roots of "state rights." L. TRIBE, AMERICAN CONSTITUTIONAL LAW at 387 n.12 (1988). To the extent that preservation of state autonomy over traditional state interests -- federalism concerns -- are thus implicated, Delaware's call for Congressional supremacy is at odds with the sovereign interests of all states.

[3] States' sovereign rights, as represented under the law of escheat, have long been recognized. The federal government has no corresponding right. *See Hodgson v. Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971)("There is never a permanent escheat to the United States ... A State may succeed via escheat to the money"); *In Re Moneys Deposited*, 243 F.2d 443, 445 (3d Cir. 1957)(where "United States has no beneficial interest therein but holds the money as statutory trustee for the rightful owners when and if they are determined . . . ," upheld "adjudication that the state is entitled as parens patriae of the missing claimant . . . in the

specific unclaimed property issues, Del. Br., 71 n.85, highlights the fact that Congressional action in the field has been limited to instances where specific federal programs or interests were involved, and that, in the absence of such action, state escheat rights and rules prevail. *See* Section I.B., *infra*.

Delaware asserts that the Court should merely mechanically apply the old ground rules, no matter how inappropriate to the facts, yielding to Congress the role of adjudging the equities. The Court, however, has recognized that its equitable authority includes the authority to "mould each decree" to the facts of a case. *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). *See also Mitchell v. De Mario Jewelry Inc.*, 361 U.S. 288, 291 (1960)(noting that equity assumes an "even broader and more flexible character" in cases involving the public interest); *Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("[e]quity eschews mechanical rules"); *Union Pacific Railway Co. v. Chicago, Rock Island & Pacific Railway Co.*, 163 U.S. 564, 600-601 (1896)("in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded").

In short, it is the responsibility of the Court to determine the applicability, scope and meaning of its own case law, and it is the responsibility of the Court to make the modifications and clarifications that its own equitable

---

absence of the claimant and of anyone else competent to inherit the claim"); *Panhandle Eastern Pipe Line Co. v. FPC*, 179 F.2d 896, 903 (8th Cir. 1949)(once trust fund "fully administered" at federal level, state "will, no doubt, ultimately receive the residual portion of the undistributed funds to which it may be entitled ...."); *American Loan & Trust Co. v. Grand Rivers Co.*, 159 F. 775 (W.D. Ky. 1908). The Court has been solicitous of the states' prerogatives in the face of claims of overriding federal interests. *See e.g., Anderson National Bank v. Luckett*, 321 U.S. 233 (1944); *United States v. Klein*, 303 U.S. 276 (1938).

principles require.[4] Under the Constitution, where the states are the parties, this responsibility is explicitly "judicial," not legislative, and the states are entitled to "demand" its exercise by the Court.[5]

B. The Court Should Not Abdicate Its Primary Role Merely Because Congress May Have The Power To Rectify An Inequitable Result

Delaware supports its argument for Congressional primacy by pointing to instances where Congress has acted with regard to unclaimed property, including 12 U.S.C. §§ 2501-2503 (1974), in which Congress changed the result in *Pennsylvania v. New York*. Del. Br., 71-72. Delaware's position is that this Congressional "activity" establishes that "Congress -- not the Court -- is the appropriate body" to effect equity here. *Id.* at 73. That position ignores Congress's own constitutional role, and misreads the effect of Congress's prior actions involving unclaimed property.

1. Congress Does Not Have And Has Not Exercised General Jurisdiction Over State Unclaimed Property Issues

Congress is a body of limited and enumerated powers. *Kansas v. Colorado*, 206 U.S. at 81-82. Unlike the Court, Congress has no express or general authority to resolve controversies between states. Congress does have power to approve state compacts,[6] but no compact is at issue here and the existence of such an option is not a basis for the Court to

---

[4] *Cf. Funk v. United States*, 290 U.S. 371, 384 (1933) ("[n]o rule of the common law could survive the reason on which it was founded. It needed no statute to change it but abrogated itself.")

[5] *Kansas v. Colorado*, 206 U.S. at 84.

[6] U.S. CONST. art. I, § 10.

decline to exercise its authority. *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945).

Congress may enact legislation that may affect states pursuant to one of its enumerated powers under Art. I, § 8 of the Constitution. These powers are at once both vast and limited. The powers are vast, because once triggered, Congress may take into account all the interests and considerations -- state, federal, even global -- bearing on a subject matter; it is not institutionally confined to resolving cases or controversies between parties based on the relative equities. Congress may also choose not to act, unlike the Court, which is obligated to decide state disputes properly before it. *Cf. Kentucky v. Indiana*, 281 U.S. 163, 176 (1930) (noting that the court has the "authority and duty to determine for itself all questions" arising due to state disputes); *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821).[7] Congress's power, however, is also limited; its actions must fall within one of the areas of enumerated federal interest outlined in the Constitution, and both its ends and means must not impinge on interests constitutionally reserved to others. *Cf. New York v. United States*, 60 U.S.L.W. 4603 (U.S. June 19, 1992).[8]

Contrary to the suggestions of Delaware, Congress has

---

[7] Over New York's opposition, the Court granted Delaware leave to file. *Delaware v. New York*, 486 U.S. 1030 (1988). No state is now raising an issue as to whether this case is justiciable or whether the Court is the appropriate forum. *Cf. Maryland v. Lousiana*, 451 U.S. 725 (1981).

[8] At least one of the Court's prior cases, *Kansas v. Colorado*, 206 U.S. 46 (1907), suggests that the outer limit of the Court's authority over issues cognizable under its original jurisdiction is greater than that of Congress. There, where the Court was faced with a state dispute and a claim by the United States, the Court found that the relevant enumerated powers of the federal government would not reach to resolve the state dispute. *Id.* at 86-90.

demonstrated particular sensitivity to the limits of its power in matters involving unclaimed property. The federal laws relating to unclaimed property that Delaware cites to buttress its assertion of Congressional authority, Del. Br., 71 n.85, uniformly involve areas of peculiar federal interest -- veterans (*e.g.*, 38 U.S.C. § 1970(h) (1991)), postal service (*e.g.*, 31 U.S.C. § 1322 (1983)), Native Americans (*e.g.*, 25 U.S.C. § 375d (1983)), government employee compensation (*e.g.*, 5 U.S.C. § 8705(d) (1967)), federal taxes (*e.g.*, 26 U.S.C. § 6408 (1989)). *See also, e.g.*, *United States v. Oregon*, 366 U.S. 643, 648-649 (1961) (rejecting Tenth Amendment challenge to federal statute vesting property of deceased wards of a veterans hospital in the United States because Congress acted within delegated power). Nothing in the words or history of 12 U.S.C. §§ 2501-2503, in which Congress reversed the result in *Pennsylvania v. New York*, suggests that Congress was occupying or even generally entering this field. Rather Congress premised that law on a finding that attempts by states to preserve their equitable entitlement under that decision, through recordkeeping requirements, would burden interstate commerce.[9] Congress was merely correcting what it perceived to be an erroneous and inequitable result.

The existence of potential Congressional authority to assert an enumerated power to correct perceived judicial error in an egregious case does not alter the basic structural assignment of responsibilities to the separate branches. Congress is certainly not assigned co-equal responsibility for adjudicating disputes among the states, nor does any concept of comity between the branches require the Court to yield its

---

[9] This assertion of Congress's power over interstate commerce was seen by some as crossing the line of Congress's constitutional authority. *See* 120 CONG. REC. 4673, 4675 (1974) (Statement of Mr. Javits).

prerogatives to Congress.[10] This controversy is before the Court now, and the Court should neither abdicate its obligation to seek an equitable resolution, nor feel compelled to apply its prior rule mechanically and inequitably, on the basis that Congress might have the authority to rectify an inequitable result.

2. In Enacting 12 U.S.C. §§ 2501-2503, Congress Confirmed That the Court Should Supplement The Rules of Texas v. New Jersey Where Equity Requires.

Completely ignoring the legislative history of 12 U.S.C. §§ 2501-2503, Delaware argues that the legislation has no relevance beyond the specific property listed. In fact, when Congress acted in 1974 to change the result in *Pennsylvania v. New York*, the Committee and sponsors explicitly stated that the decision in that case had taken too narrow a view of the Court's prerogative, and duty, to expand upon its own equitable rulings, especially when necessary to preserve the principles underlying such rulings. Congress believed that it was returning to the controlling legal principles adopted by the Court in *Texas v. New Jersey*.

---

[10] Thus, the Court's role here is quite different from its role in *Quill Corp. v. North Dakota*, 60 U.S.L.W. 4423 (U.S. May 26, 1992). There the Court dealt with an area of interstate commerce where Congress has the paramount authority, and where the Court's authority is secondary, flowing from so-called "dormant" implications of the Commerce Clause. *Id.* at 4425, 4428. Here, the constitutional structure is reversed, with the Court exercising a specifically assigned, paramount power of its own over the states in a field peculiarly infected with state interest. There is, thus, no institutional or structural rationale for deference by the Court to Congress. Moreover, unlike *Quill*, this case involves not changed circumstances, but facts simply not contemplated in the prior rules adopted by Court.

As discussed in our prior submission,[11] in responding to *Pennsylvania v. New York*, Congress adopted the dissenting Justices' interpretation of the applicable law.[12] The Committee's Report incorporated the comments of Arthur F. Burns, Chairman of the Board of Governors, Federal Reserve System, that the result in *Pennsylvania v. New York* was an "obvious inequity" which the bill corrects by adopting the "similar position" advanced by Justice Powell in dissent. S. REP. No. 93-505, 93d Cong., 1st Sess. 3 (1973). The Committee noted that "[c]onflicting claims and the effect of a recent United States Supreme Court decision currently result in inhibiting ... an equitable distribution." *Id.* at 2. *See also* 120 CONG. REC. 4673, 4679 (1974)(Statement of Mr. Sparkman)(noting "that we have done just as Justice Powell suggested.")

Senator Tower, one of the bill's original sponsors, explained that in presuming that the state of purchase of money orders was the address of the purchaser, the bill was "*clearly in line with the intent of the Supreme Court in its consideration of this problem*" in *Texas v. New Jersey*. 120 CONG. REC. at 4529 (emphasis supplied).[13] Congress's

---

[11] Exceptions of the States of Michigan, Maryland, and Nebraska, and the District of Columbia to the Report of the Special Master, No. 111 Orig., 13 n.15 (May 1992).

[12] Justice Powell's dissent, joined by Justices Blackmun and Rehnquist, stated that "[t]he reasons underlying *Texas v. New Jersey* could best be effectuated by a relatively minor but logical deviation in the manner in which that rule is implemented in this case." 407 U.S at 219. The dissent advocated a modification that would preserve the equitable preference of the state of the creditor, with reliance on "relevant information" that "would be more easily obtainable". *Id.* at 220.

[13] Congress used its interstate commerce power to avoid the recordkeeping burden that states would impose to maintain their equitable entitlement to escheat under the "last known address of the creditor" preference. *See* 12 U.S.C. § 2501(5). "From a practical standpoint, ...

provision for retroactive treatment of its law to the date of the decision in *Texas v. New Jersey*,[14] confirms that Congress desired to jettison the majority opinion in *Pennsylvania v. New York*, and have future state unclaimed property disputes resolved in accordance with the original principles of *Texas v. New Jersey*, as interpreted by Justice Powell and his fellow dissenters.[15]

Delaware, in other contexts, strenuously asserts that state law should "inform", and indeed bind, the Court in

---

unless a State wants to develop cumbersome and costly recordkeeping requirements, all the money to which that State is otherwise entitled will go as a windfall to one State, the corporate domicile of the issuer". 120 CONG. REC. at 4528 (Statement of Mr. Sparkman). "[T]he legislation is intended to do equity while avoiding the unnecessarily cumbersome recordkeeping requirements that would drive up the cost of these instruments to the consumer," *id.* at 4529, in situations where addresses were not kept by holders "as a matter of business practice." 12 U.S.C. § 2501(1).

[14] "One of the objectives of this proposed law, in addition to fostering an equitable distribution of abandoned money orders among all the States in their fair share, is to relieve the courts of very tedious and lengthy lawsuits involving these claims. The reason the committee selected the 1965 date was to provide for a smooth transition of the law to follow as closely as possible the Supreme Court decision, Texas against New Jersey, which was decided February 1, 1965. If we substitute any date other than 1965, we unnecessarily create a hiatus in the law and would further encourage lawsuits rather than settling this matter -- per the request of the Supreme Court -- once and for all." 120 CONG. REC. 4673, 4674 (1974) (Statement of Mr. Tower). *See also* 120 CONG. REC. at 4529.

[15] Delaware's attempt to give Congress's action its narrowest scope also conflicts with the text of the statute, which includes a "money order, traveler's check, *or other similar written instrument*" on which, broadly defined, a banking, business, or financial organization "is directly liable." 12 U.S.C. § 2503 (emphasis supplied). *See also* 12 U.S.C. § 2502. Delaware's contradictory focus on the exclusion of "third party bank checks" as requiring a narrow construction is unsupported in the legislative history.

determining federal common law principles. Del. Br., 46-49. Yet it overlooks the recognized proposition that Congressional action, through federal statutes, also bears upon determination of the federal common law. *See Moragne v. States Marine Line*, 398 U.S. 375, 390-392 (1970); *Connecticut v. Massachusetts*, 282 U.S. 660, 670 (1931). *See also Mitchell v. De Mario Jewelry*, 361 U.S. at 292 ("there is inherent in the Courts of Equity a jurisdiction to... give effect to the policy of the legislature"). The fact that Congress acted only in terms of the particular types of property brought to its attention does not undermine the force of what it was saying with regard to the reasoning of the decision in *Pennsylvania v. New York*.[16]

In essence, as the legislative history confirms, Congress agreed with the *Pennsylvania v. New York* dissenters that, whatever the merits of the *Texas v. New Jersey* distribution mechanism for the majority of unclaimed property dispositions, an alternative must obtain where its application

---

[16] As the Court itself has recognized, the fact that Congress acts only with regard to a particular subject matter -- in this case particular types of unclaimed property -- should not invariably limit the import of what Congress has done or said. *United States v. Hutcheson*, 312 U.S. 219, 235 (1941). Rather, the Court has expressed its understanding that the nature of the legislative process may be directed at a particularly defined problem -- one brought to Congress's attention at the time -- but still be expressing a proposition with wider implications. *Id.* "'The major premise of the conclusion expressed in a statute, the change in policy that induces enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before.'" *Id.*, *quoting*, *Johnson v. United States*, 163 F. 30, 32 (1st Cir. 1908)(opinion of Mr. Justice Holmes on circuit). And the Court has given affirmative recognition to such Congressional developments by modifying, where appropriate, its case law. *Id. See also United States v. Fausto*, 484 U.S. 439 (1988); *Moragne v. States Marine Line*, 398 U.S. 375 (1970); *Eli Lilly and Co. v. Medtronic, Inc.*, 872 F.2d 402 (Fed. Cir. 1989), *aff'd*, 496 U.S. 661 (1990).

produces inherently inequitable results. In its explanation of its action, in the particular action it took, and in making its particular action retroactive, Congress was not, as Delaware would have it, merely saying, "We have corrected the Court's error here, and will correct any future such error when the time comes." Rather it was saying, "There was a conceptual error in the way the Court handled this case. We think the Court should not have made that error here, and should not do so in the future. We have corrected it here in hopes that we will not need to do so in other cases."

That conceptual error, of course, was the conclusion that the Court was required to apply its prior rule even if, in the words of the dissent, that would "defeat ... each of the beneficial justifications for that rule." *Pennsylvania v. New York*, 407 U.S. at 218 (Powell, J., dissenting). Congress rejected the majority's holding that "we do not regard the likelihood of a 'windfall'... as sufficient reason for carving... [an] exception to the Texas rule." *Id.* at 214. Thus, in any case where such inequities would result if the rule of convenience were applied mechanistically, the Court must decide in a manner that respects the equitable interests of the states. In other words, it must act to distribute "escheats among the States in proportion to the commercial activities of their residents." *Texas v. New Jersey*, 379 U.S. at 681.

While the Court, with perhaps some element of hyperbole, did express the hope in *Texas v. New Jersey* that the rules of convenience adopted to allocate the small amount of property at issue there would satisfy the states' needs "once and for all," 379 U.S. at 678,[17] Congress clearly thought

---

[17] Contrary to Delaware's suggestion, Del. Br., 9, many issues have arisen as to the applicability and reach of *Texas v. New Jersey*. For example, at least one court has noted that for owner-unknown property, the Court's rules are simply inapposite. *O'Connor v. Sperry & Hutchinson Co.*, 379 A.2d 1378 (Pa. Commw. Ct. 1977), *aff'd*, 412 A.2d 539 (Pa. 1980). "As this case demonstrates the Court's optimism regarding the

some supplementation -- preferably by the Court -- was justified after only seven years. Now, twenty-seven years after *Texas v. New Jersey*, with the states arrayed in four different directions as to how the principles of that case should be interpreted and applied here, it is clear that the existing rules of thumb will not, as the Court had hoped, be "generally acceptable to all the States," *id.* at 683, if applied inflexibly here.

II. THE "LAW" OF *TEXAS V. NEW JERSEY* PRECLUDES APPLICATION OF THE OLD BACKUP RULE HERE, AND REQUIRES ADOPTION OF AN EQUITABLE SOLUTION.

Notwithstanding the impassioned arguments of Delaware and New York, expanding upon the original rules to meet the needs of this case does not raise *stare decisis* concerns: first, as a matter of law, because the general equitable principles of the original decision explicitly require supplementation of the old rules here, and, second, as a matter of fact, because this case is so different in nature from its precursors. Indeed it is the route proposed by Delaware and New York that violates the underlying equitable principles -- the "law" -- of *Texas v. New Jersey* and must be rejected.

A. *Texas v. New Jersey* Makes Clear That Equity Is the Court's Overriding Principle and That Only Insubstantial Departures From That Standard Will

---

universality of its rule was perhaps too great." 379 A.2d at 1381 n.3. *See also* 412 A.2d at 541 n.4 (distribution there under the Court's rule would mean that "no state would be able to demonstrate that its claim to escheat is paramount" because of the absence of creditor information). Other courts, noting that the Court's decision was not directed at state jurisdiction, have permitted states to take custody of property under circumstances that, standing alone, seem contrary to the distribution scheme of the Court. *See, e.g., State v. Liquidating Trustees of Republic Petroleum Co.*, 510 S.W.2d 311 (Tex. 1974).

be Tolerated to Achieve Convenience

New York and Delaware fail to distinguish between the Court's basic principles, applicable to all unclaimed intangible property cases, and the particular rules of thumb that the Court chose, in the context of the facts at hand, to effect those principles. The principles of *Texas v. New Jersey*, the general "guideposts"[18] set forth by the Court, are fully applicable here:

> 1. Decisions as to "which State's claim to escheat is superior to all others"[19] that might have jurisdiction over the unclaimed funds, "should be determined primarily on principles of fairness." 379 U.S. at 680.
>
> 2. Fair allocations "tend to distribute escheats among the States in proportion to the commercial activities of their residents." *Id.* at 681.
>
> 3. Primary focus should be on the location of the "creditor", *i.e.*, the true owner, rather than the "debtor". *Id.* at 680.
>
> 4. Despite "obvious virtues of clarity and ease," state of incorporation is not an equitable standard. *Id.*
>
> 5. For administrative convenience, reasonable surrogates for the actual location of lost owners may be used. *Id.* at 681.

Fulfilling its original jurisdiction responsibility, the Court also selected specific means to allocate the property under those general principles in light of the facts at hand:

---

[18] *Pennsylvania v. New York*, 407 U.S. at 216 (Powell, J., dissenting).

[19] *Texas v. New Jersey*, 379 U.S. at 679.

1. To achieve an approximation that was both fair and convenient, the location of each creditor would be presumed to be the location most easily determined from "available" data, *i.e.*, the address shown on the books and records of the holder of the unclaimed property, 379 U.S. at 680-681; and

2. Solely for purposes of convenience, in exceptional instances where the creditor's address did not appear on the debtor's records, the state of domicile of the debtor would be entitled to hold the funds, always subject to a superior claim by another state. *Id.* at 682.

The Court recognized that these rules would not accomplish perfect equity. In the context of its primary rule, it conceded that the address of the creditor on the books and records of the debtor might not always reflect the creditor's technical domicile, or even his actual location. 379 U.S. at 681. But because that information was the best "available," *id.* at 681 n.11, and because "such situations probably will be the exception, and any errors thus created, if indeed they could be called errors, probably will tend to a large extent to cancel each other out", the Court did not think such minor and random inaccuracy destroyed the general fairness of the last known address rule in allocating intangible property in proportion to the relevant commercial activities in the states. *Id.* at 681.

In considering state of incorporation, however, the Court in effect recognized that the biases were not likely to be random or offsetting. It said that general use of that standard, despite its convenience, "would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." 379 U.S. at 680. The Court therefore allowed state of incorporation to be used only to provide certainty in the special cases, "likely to arise with comparative infrequency," of property with no address (or no applicable

law in the state of address), and only "to cut off the claims of private persons ..., retaining the property for itself only until some other state comes forward with proof that it has a superior right to escheat." *Id.* at 682.

Mechanistic application of the state of incorporation "clean-up" process here would thus violate both the qualitative and quantitative precepts laid down by the Court: without any equitable justification, huge amounts of funds would be diverted from all the states where the lost owners presumably lived to the state "in which the debtor happened to incorporate itself." 379 U.S. at 680. Neither Delaware nor New York can show anything in the 1965 opinion which suggests that the Court would have interpreted its principles to *require*, or even permit, hundreds of millions of dollars of property to be allocated in this manner.[20]

B. The Underlying Principles of *Texas v. New Jersey* Control Here Since That Case's Rules of Convenience Did Not Address the Circumstances of This Case.

The simple fact, which Delaware and New York overlook, is that neither of the *Texas v. New Jersey* rules of convenience directly covers this type of case. Those mechanisms were designed for distribution of modest amounts of owner-known property, most of which was also address-known, with an even smaller residue of owner-known but

---

[20] Delaware indicates that it hopes to get some $139 million out of this case. Del. Br., 20 n.31. New York indicates that in the past six years alone, it has taken hold of $631 million of affected property which it hopes to retain under various theories, including state of incorporation. Exceptions of the State of New York to the Report of the Special Master, No. 111 Orig., 91 (May 26, 1992) (hereinafter "N.Y. Br.").

address-unknown items.[21] Under those circumstances, the "infrequent" instances not covered by the "primary" rule of thumb could be covered by an arbitrary "clean-up" rule with only a minor offense to equity.

This case involves huge amounts of property, all of which is not merely address-unknown, but also owner-unknown. Thus, the Court is faced with circumstances it did not address in 1965, and for which its rules of convenience provide no answers. The "primary" rule cannot apply because there is no information as to the identity of individual creditors or their addresses.

New York suggests that, since the Court in *Texas v. New Jersey* was satisfied with an "apparent" address, *i.e.*, the creditor's last known address on the books and records, the Court here should be satisfied with an "apparent" creditor, *i.e.*, the mass of broker-agents with whom the holder does business, most or all of whom New York presumes to have New York addresses. N.Y. Br., 74-76. Yet there was no dispute in *Texas v. New Jersey* over the identity of the actual creditor, only his or her location. Thus, there was no cause for the Court to address the unusual and quite distinct situation of creditor-unknown property. The Court did consider and adopt a surrogate for the *location* of the creditors. It did not deal with the possible need for a surrogate for the *identity* of the creditors. Moreover, unlike the primary rule in *Texas v.*

---

[21] Delaware's misunderstanding of the case is highlighted by its use, from the very start of its exceptions, of the term "owner/address unknown" to describe the property covered by the "backup rule." *See, e.g.*, Del. Br., E-2. *Texas v. New Jersey*, however, contains no such term, and nowhere describes the dichotomy suggested by Delaware: "a 'creditor' -- who is either 'known' but 'lost' (under the primary rule) or 'unknown' (under the backup rule)...." Del. Br., 31. The Court's division is between "vanished creditors" with an "address on the records of the debtor", 379 U.S. at 681, and "property owed persons ... as to whom there is no record of any address." *Id.* at 682. "Owner unknown" property is never mentioned.

New Jersey, which was bottomed on the equity inherent in distributions to the various states of the creditors, New York's version of the primary rule would accomplish no such equitable distribution, rough or otherwise, since it would grant most of the property to New York.[22]

Application of the state of incorporation clean-up rule here also would not be consistent with any of the Court's basic principles. The property would not be allocated "among the States in proportion to the commercial activities of their residents." 379 U.S. at 681. The allocation would not focus on creditors rather than debtors. It would not limit use of state of incorporation to "clean-up" use for infrequent residues of address-unknown property within a universe of address-known property. Rather application of the rule to this creditor-unknown property would convert what the Court viewed as a minor and temporary custodial expedient into a major grant of permanent escheat, creating what both the majority and dissent in *Pennsylvania v. New York* recognized as a totally undeserved "windfall". 407 U.S. at 214, 220. This is true because the nature of the property as creditor-unknown virtually insures that no other state could assert a superior claim as the state of the creditor.[23]

In fact, what Delaware and New York are asking for is an extension of the backup rule beyond its original boundaries, an extension which, in the words of the dissenters in *Pennsylvania v. New York*, the Court had in 1965 "specifically repudiated" as "inconsistent with 'principles of

---

[22] New York's attempt to re-cast these "apparent" creditors as presumptive actual creditors is discussed in Section III B below.

[23] Of course, if the Court accepts our position that each other state is entitled to make a "superior" equitable allocation claim against that custodian state for a share of these funds, based on its citizens' estimated share of the commercial activities which gave rise to the funds, such windfalls would be reversed.

fairness'". 407 U.S. at 218, *quoting, Texas v. New Jersey*, 379 U.S. at 680. It is those states which are asking the Court to violate its precedents, and it is the Master and the intervenors who are asking the Court to be true to its principles and precedent by filling the gap in its guidelines with an equitable rule responsive to the size and facts of this case.

C. *Pennsylvania v. New York*, Even if Binding, Would Not Require Use of the Old Backup Rule Here

Even if *Pennsylvania v. New York* were a viable precedent, the majority opinion there does not preclude adoption of a different administrative means of distribution in different circumstances. What motivated the majority to apply the *Texas v. New Jersey* disposition mechanism in *Pennsylvania v. New York* was its stated inability to distinguish the two cases. The majority expressed hesitancy to vary application of the *Texas v. New Jersey* rule merely based on a "higher percentage of unknown addresses." 407 U.S. at 214. It noted that, under the facts, it was "not told what percentage is high enough to justify an exception to the Texas rule, nor is it entirely clear that money orders constitute the only form of transaction where the percentage of unknown addresses may run high." 407 U.S. at 214-215. The Court also noted that Western Union's records might indeed, upon fuller review, contain many of the necessary addresses, *id.* at 215, thus reducing the proportion of address-unknown items. The majority worried that varying the means of distribution simply on the basis of the "adequacy" of the holder's records would require a fact-intensive inquiry in virtually every case. *Id.*

Finally, the Court pointed out that the states had it within their power and control to demand that Western Union keep adequate records. *Id.* In other words, because it thought

the states had the ability to minimize the proportion of money orders which would pass under the arbitrary backup rule, the 1972 Court, like the 1965 Court, was willing to allow a minor amount of inequitable allocation (the "windfall" cited by both majority and minority) to persist.

This case, however, does not call upon the Court to distribute a universe of discrete items, like checks or money orders, belonging to known owners, with a lower or "higher percentage of unknown addresses." Here the entire universe consists not of discrete "debts" to identifiable creditors, but of undifferentiated residues of complex accounts each belonging to one or many creditors unknown -- and for all practical purposes unknowable -- to the holder. There is no question of the "adequacy" of a holder's records, just an informational void. Neither the individual holder nor the individual states can adopt or require an informational system that will close this data gap.

Thus the reasons for the *Pennsylvania v. New York* majority's refusal to develop an alternative distribution mechanism for that case do not obtain under the facts of this case. The Court may reaffirm the prior precedents, both as to their law and as to their implementing mechanism, and their applicability to the majority of unclaimed property dispositions, and still reach a different equitable result responsive to the facts of this case. If a bright dividing line is necessary, that line is clearly crossed where there are no addresses, and where the state has no means of protecting its equitable rights by requiring records that would show creditors' addresses. On the other side of that line, neither the last known address on the books and records rule nor the state of incorporation of the holder rule provides even a modicum of equity.

The Court is thus fully justified in doing today what the Court did in 1965, selecting a rule for these cases which optimizes equity while minimizing inconvenience. Whether

that rule is the rule suggested by the Master, which modifies the backup rule in the interests of equity, or the equitable allocation approach advocated by some states, which attempts more directly to reflect the distribution of relevant commercial activities among the states, as the Court's underlying first principles instruct, it can be adopted without any need to "overrule" either *Pennsylvania v. New York* or *Texas v. New Jersey*.

III. THE FACTUAL ARGUMENTS OF DELAWARE AND NEW YORK PROVIDE NO JUSTIFICATION FOR GRANTING THEM DISPROPORTIONATE SHARES OF THE FUNDS AT ISSUE

On one theory or another, New York and Delaware would each like to get all or most of the broker-held funds. This despite the fact that 85% or more of the brokers' customers, the people who engaged in the transactions giving rise to the unclaimed overages, and who were likely to be the actual beneficial owners, were probably located in other states.[24]

A. The State of Incorporation Is Not the State Where the Relevant Commercial Activities Occurred.

Delaware attempts to transmute the Court's use of state of incorporation as a convenient back-up mechanism into a meaningful selection by the Court of the "second best" state. To do this, Delaware asserts that the *Texas v. New Jersey* rule evolved from the Court's prior decisions upholding the exercise of jurisdiction over unclaimed property by a state of

---

[24] *See* Appendix A to Exceptions of the States of Michigan, Maryland, and Nebraska and the District of Columbia to the Report of the Special Master, No. 111 Orig., A-1 - A-4 (May 1992) (New York and Delaware together had about 13% of the specified indicators of brokerage activity).

incorporation, and was a substantive selection of the state with "constructive dominion." Del. Br., 33-34.[25]

No reading of *Texas v. New Jersey* supports a claim that the "backup" rule, explicitly adopted as a rule of convenience, also reflected a substantive, equitable determination of the state with the strongest, or even a strong, claim to permanent possession of unclaimed property belonging to address-unknown creditors. Certainly, if this were the case, the Court would have selected a different locational factor than the one that it characterized as "a minor factor" which it declined to "exalt" by permitting it to "escheat... obligations incurred all over the country." 379 U.S. at 680. Clearly the Court did make such a substantive determination in selecting the primary mechanism of *Texas v. New Jersey*, relying on the equities first, and then on convenience. In selecting a backup mechanism, the Court was not, as Delaware suggests,[26] answering Justice Jackson's call for a "lawyerlike definition of state power."[27] Rather, the Court was only doing exactly what it said it was doing:

---

[25] Delaware's revisionist history is certainly inconsistent with the view of the dissenting Justice in *Texas v. New Jersey*, who felt the Court's decision was a radical departure from the precedents upon which Delaware now relies to reconstruct a family tree. 379 U.S. at 683 (Stewart, J., dissenting). And, it also appears inconsistent with the actual views of Justice Jackson, from whom Delaware borrows, who believed that many states could claim "constructive dominion" over the unclaimed property. *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 558-559, 562 (1948)(Jackson, J., dissenting). In fact, in a later opinion, Justice Jackson appeared to express disapproval of state of incorporation. *Standard Oil Co. v. New Jersey*, 341 U.S. 428, 443-445 (1951)(Frankfurter J., dissenting joined by Jackson, J.). *See also id.* at 445 (Douglas, J., dissenting).

[26] Del. Br., 33.

[27] *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541, 563 (1948) (Jackson, J. dissenting).

selecting an administratively convenient "solution" for a situation "likely to arise with comparative infrequency" in order to promote "certainty." 379 U.S. at 682.

In an understandable effort to provide the equitable weight which the Court found lacking in the backup mechanism, Delaware asserts that its user-friendly corporate laws, which attract so many incorporators, demonstrate Delaware's equitable entitlement to a major share of several hundreds of millions of dollars actually belonging to the citizens of other states. Delaware fails, however, to demonstrate that the state of incorporation -- of either the holder or the issuer -- is necessarily or even usually the situs of any significant portion of the commercial activity that gave rise to the unclaimed property. The state of incorporation is usually neither the locus of the economic activity of the issuer as upstream creator of the dividends and interest, nor the source of the trading activity of individual investors that actually causes the distributions to get lost on their way to the true beneficial owners. On the contrary, the witnesses from the Depository Trust Corporation (DTC), the brokers, and Citibank testified that the state of incorporation of these holders had no impact on the conduct of their securities business.[28] The record simply does not support Delaware's argument that its attraction for incorporators relates in any meaningful way to the generation of the unclaimed property here.

The fact that almost all the large brokers were incorporated in Delaware is less important than the fact that only a third of one per cent of their offices and brokers are located and transact business there. The fact that 40 or 50% of the largest corporations are domiciled in Delaware does not offset the fact that only a third of one per cent of the nation's

---

[28] Cirrito Dep., 118-121; Shearer Dep., 453-454; Principe Dep., 152-153. *See also* Shearer Dep., 519; Scott Dep., 188-189.

shareholders live there.[29] Almost nothing happens in Delaware that produces the income stream from which this property ultimately derives or that generates or supervises the securities transactions that actually separate this property from its beneficial owners. The state's routine issuance of the birth certificate of the corporate "artificial being" does not create a substantial equitable nexus between Delaware and the unclaimed property here.[30]

Nor is Delaware entitled to greater equitable credits because of its corporate regulation. While Delaware corporations are indeed governed in certain respects by Delaware law, Delaware in no sense regulates or polices the day-to-day investment activities through which citizens of all the states purchase securities and receive the distributions they generate. It is the states where shareholders live which have primary responsibilities for registering and policing the local offices and registered representatives of securities brokers whose interactions with state citizens generate the transactions which cause the unclaimed property at issue here. Through their administrative agencies, courts, and laws, all of the states receive, investigate and respond to complaints by investors in the state against those so registered.[31] Moreover, while

---

[29] *See* Exceptions of the States of Michigan, Maryland, and Nebraska and the District of Columbia to the Report of the Special Master, No. 111 Orig., 7 n.5, 8 n.6 (May 1992).

[30] Del. Br., 54. Even the case cited by Delaware for the proposition that the state of incorporation plays an important role, notes that large corporations "have shareholders in many states and shares that are traded frequently" and are dependent upon this public ownership for the provision of capital. *CTS Corp. v. Dynamics Corporation of America*, 481 U.S. 69, 90 (1987).

[31] *See* Final Brief of the Designated States in Support of Their Dispositive Motion and in Opposition to the Other States' Dispositive Motions, No. 111 Orig., 6-7, Appendix D-E (January 30, 1990). Appendix D of the Final Brief of the Designated States is the affidavit of

Delaware suggests that the cost of its corporate protection activities justifies its receipt of the proceeds of unclaimed property held by its corporate domiciliaries, Del. Br., 69, Delaware can and does charge those corporations fees and taxes to defray the cost of those activities.[32]

B. New York's "Creditor-Broker" Theory Is Unsupported By Logic Or Evidence

1. The Record Establishes That The Unknown Owners Are Likely To Be Brokers' Customers In All The States Rather Than Brokers In New York.

No party, save New York, argues against the proposition that the unclaimed property here is wholly creditor-unknown. And all parties, save New York, appear to agree that whoever those creditors may be, they are likely to

---

Michael Fines, the Superintendent of Securities for the State of Rhode Island. Mr. Fines describes generally the regulation and enforcement activities of his office over brokers and others in that state, and particularly his office's authority over investor complaints. Appendix E is the affidavit of Ellyn L. Brown, Securities Commissioner for the State of Maryland, who similarly describes the oversight and enforcement functions over securities dealers and investor complaints undertaken by Maryland. Attached to Ms. Brown's affidavit is an example of a typical investor complaint to the Maryland Securities Division. This complaint involved the failure of an investor to receive from his broker recognition of a stock dividend, and accrued dividends on the split stock, precisely the type of error which might lead to an "overage" in the broker's accounts.

[32] Delaware reports that the budget for its Division of Corporations is $4 million per year. Del. Br., 69. But its unclaimed property receipts since 1965 -- most presumably from the backup rule -- have been "hundreds of millions of dollars," *id.* at 74, including over $30 million in 1990. National Assn. of Unclaimed Property Administrators, NAUPA Unclaimed Property Statistics (For year ending 6-30-90). Thus, even without the corporate fees and taxes, it is way ahead of the game, and certainly needs no further subsidy at the expense of the other states.

be located in states throughout the country. Unlike the holders in *Texas v. New Jersey*, where the property was mostly uncashed checks sent to specific people at specific addresses, the holders here do not have a check, a name, or an address. The unclaimed funds are net balances in accounts, funded by large distribution payments in and reduced by many, perhaps many thousands, of small payments out. The holder cannot find out who the true owner is unless that owner, or his or her agent, makes a claim.[33] The record establishes that holders must rely on claims -- on information external to their systems -- to determine the actual owner. In the absence of a claim, the holder only knows that the overage is attributable to a security once held by one or more among a group of its customers, located in many states, who were the beneficial owners before or around the record date. As discussed above, the character of this property as creditor-unknown is a material distinction between this case and the Court's prior cases, and New York's attempt to wrap this property in the garb of owner-and-address-known property fails in the face of the evidence.

As a simple matter of logic, New York's assertion that the intangibles here are owner-known is unsustainable. If the actual creditor were identified, the particular amount would presumably have been paid to that creditor (whether another broker, a bank, or some intermediary's customer), or to the state of the actual last address (not the "trading address") of the creditor on the holder's books if a check to the creditor were returned. In short, funds owed to identifiable creditors in known locations are not within the scope of this case, as every party, except New York, recognizes and as the evidence

---

[33] If such a claim is made and is successful, then that part of the overage is, of course, no longer unclaimed property.

clearly establishes. Mas. Rep., 10-11, 58, 61-67.[34]

Lacking facts to contradict that logical conclusion, New York attempts to escape logic by postulating that, in almost every case, the true beneficial owner of the unclaimed distribution has been made whole by its agent and that the agent is invariably left as the creditor. N.Y. Br., 74. To begin with, New York's assertion is based on the assumption that there is only one type of unclaimed overage, resulting from a buying broker's failure to re-register certificates before the relevant record date. N.Y. Br., 17; Mas. Rep., 66 n.57. But as the Master notes, the evidence showed that "overages" in the hands of brokers result from a variety of different "glitches" in the flow of dividend and interest payments, many of which do not even permit what New York suggests is the universal phenomenon. Mas. Rep., Appendix B, Findings 57-59 at B-16 - B-17.

Yet, even under New York's assumption as to the cause for this unclaimed property, it does not follow that the actual creditor is a broker. New York suggests that a buyer's agent would always advance the funds to its customer, even though it did not receive the distribution, because that customer was "long" on the agent's records on the record date. Yet, the evidence here shows that unless the customer's right to the advanced funds is confirmed, in which case the broker is entitled to, and routinely seeks, reimbursement of its advance from the holder's overages, the credit to the customer can and will be reversed.[35] Thus, a customer remains the

---

[34] As the Master noted, it was the "unanimous conclusion" of the industry deponents "that the unclaimed funds at issue are net of all successful efforts to identify appropriate recipients and are truly owner-unknown." Mas. Rep., 61.

[35] Cirrito Dep., 62-63; Shearer Dep., 144-145, 164; Principe Dep., 80-82, 160-161; Scott Dep., 140. New York refers to the same pages of Mr. Cirrito's deposition in support of its claims, N.Y. Br., 31; however

true party in interest with respect to the advanced amount. *See* Mas. Rep., 62 n.54.

Advancing unreceived funds to a customer, under New York's assumption, would leave the broker with an "underage." Whenever a broker is left with an underage, it will take every possible step to research the reason for the underage and make a claim for recovery of the missing distribution.[36] Brokers have special staffs, procedures, and forms to do this, and it is done "routinely" by all brokers.[37] Thus, even where an advance to a customer does occur, so that a temporary underage is created, that underage is almost invariably resolved with a claim and is thus highly unlikely to leave the contra-party with unclaimed funds. In fact, the record before the Master showed that none of the examples of belated claims for abandoned property submitted to New York, and included by New York in its discovery responses as "representative" of the claims it receives, appear, on their face, to fit New York's "creditor-broker" theory.[38]

---

this testimony actually contradicts New York's position.

[36] *See e.g.*, Principe Dep., 113-115; Shearer Dep., 217-222, 235-236; Cirrito Dep., 72, 91.

[37] Principe Dep., 115-116; Shearer Dep., 277-279; Cirrito Dep., 75-76.

[38] *See generally* Response of the Designated States in Opposition to the Dispositive Motions of New York, Delaware, Texas, *et al.* and Alabama, *et al.*, Against the Complaint of the Designated States, No. 111 Orig., 17-18 n.21 (December 19, 1990); Reply of the Designated States to the Briefs in Opposition to the Motion of the Designated States for a Dispositive Order, No. 111 Orig., 9-10 (January 18, 1990). For example, one claim resulted from a transfer agent's failure to cancel 100 shares that had been registered in the name of Cede & Co., resulting in an overage to DTC. *See* New York's Document Production In Response to Interrogatory 25 at N4917-4990 (Bates stamp). New York's broker-related claims resulted from errors in internal bookkeeping at brokerage houses, producing failures to distribute dividends received to proper accounts. *Id.* at N4991-

The corollary of this evidence is that it is much more likely that an overage would have been paid by a broker to New York as unclaimed property if a customer rather than a broker were the one left with the "underage", because a customer is far less equipped than a broker to notice, research and assert a claim. This conclusion is supported by the one example of a customer's investment account statement available in the record.[39] In this example, the customer was provided neither the record date for the distribution nor the amount of the distribution per share. Thus any error in either of these factors, or in the number of shares held on the record date or in the computation of the amount the customer was owed, would be difficult, if not impossible, for a typical customer to detect. Moreover, if the error were a complete omission of a distribution, especially on shares newly purchased, the customer would see nothing on the broker's monthly statement to suggest that there was a problem.

New York ignores its own admissions that the holders in this case, whether brokers, banks, or depositories, virtually always act as agents for their customers or participants'

5015. Other claims were submitted by beneficial owners. *See id.* at N5016-5027. *See also* Exhibits 5-6 of Appendix of Exhibits to Brief In Support of Motion for Partial Summary Judgment of the Plaintiff Intervenor States of Alabama, Alaska *et al.*, No. 111 Orig. (October 30, 1990). Even New York's principal piece of evidence, the "Affidavit of Robert Griffin" does not support its basic theory. In the only example provided in the affidavit, the "creditor-broker" was a bank, and the bank under the facts had no claim. The "holding" broker's payment of dividends to the bank had created an overage at the bank, at the expense of the broker's own customer. *See* Reply of the Designated States, *supra*.

[39] Prudential Bache Exhibit 7, Example D.

customers.[40] And it ignores the fact that the unclaimed property arises from the commercial activities of these customers in every state of the Union, through the buying, selling, and transferring of security certificates, or through other changes in ownership or custody, which result in temporarily misdirected distributions.[41]

2. Nothing In The Record Supports New York's Assertion That A Creditor, Even a "Creditor-Broker," Can Be Identified Solely From Review Of A Holder's Books and Records.

Relying principally on the "Affidavit of Robert Griffin," an employee of the New York State Comptroller, N.Y. Br., 80, New York contends that review of an individual holder's records would reveal the name of a creditor, *i.e.*, a broker who represented the contra-party in the transaction which gave rise to the unclaimed property.[42] Under New York's construction of *Texas v. New Jersey*, the revelation of this name -- the "apparent" creditor -- coupled with an

---

[40] Renewed Motion for Judgment on the Pleadings Against the Plaintiff-Intervenor States (New York), No. 111 Orig., 62 (October 30, 1990).

[41] *See* Exception of the States of Michigan, Maryland, and Nebraska, and the District of Columbia, to the Report of the Special Master, No. 111 Orig., 18 n.22 (May 1992).

[42] New York estimated that it would take 36 person years of auditing to track one year's unclaimed overages through the system, but concluded that it is not "cost effective ... to reconstruct these transactions." Brief in Opposition To Motion For Leave To File Complaint (New York), No. 111 Orig., 8 (May 9, 1988).

assumption of a New York address,[43] triggers a distribution of broker-held unclaimed property to New York under the primary distribution mechanism.

This interpretation of the evidentiary force of the Griffin Affidavit is contrary to the testimony of every single brokerage witness that it is impossible to trace a particular overage to a particular owner solely from the books and records of the holder.[44] Indeed, contrary to the impression fostered by New York, Mr. Griffin does not say that he actually reconstructed and traced any overages to determine who the true beneficial owners were. He merely assumed that "creditor-brokers" were always the true owners of the

---

[43] Under New York's theory, the state of the last known address as shown on the holder's books would be replaced with its own invention: the state of the assumed "trading address" of brokers with whom the holder does business, whether or not they are the actual creditors and whether or not the relevant activity which gave rise to the unclaimed property took place in the state of the so-called "trading address." Of course, the term "trading address" does not appear in *Texas v. New Jersey*, nor as far as is apparent from any of New York's filings, in any other unclaimed property case. *See also* Mas. Rep., 67 n.59. New York defines "trading address" as the place where brokers "receive" delivery of securities, *i.e.*, "the official address used by the National Securities Clearing Corporation ... the service that delivers physical certificates *between brokers and bankers in New York*." N.Y. Br., 80 n. 59 (emphasis added). It is thus no surprise that "most, if not all" remitting brokers have "trading addresses in New York." *Id.* Yet, New York is not the situs of the widely dispersed commercial activities of securities investors which should govern distribution of this property, since the brokers are merely transparent agents for their customers in every state. It is obvious as the Master noted, that "trading address" is a "conception created out of whole cloth... to rationalize what ... [New York] has been doing for years." Mas. Rep., 67 n.59.

[44] Shearer Dep., 192-193, 198; Principe Dep., 95-97, 102, 104-105; Cirrito Dep., 73, 92-93.

unclaimed property at issue.[45]

More significantly, however, the procedure described by Mr. Griffin does not even establish that holders can identify a "creditor-broker." The Griffin Affidavit contains only one example, a $1100 overage on a Houghton Mifflin dividend at "Broker X."[46] Mr. Griffin assumed that because Broker X had an overage of $1100 on a distribution of 22 cents a share, the transaction at issue must have been a 5000 share sale. In fact, the overage could just as well have resulted from two 2500 share sales, or a 5000 share clerical error (*e.g.*, "7000" recorded as "2000") in recording a customer's sale, or even a 5000 share purchase transferred prematurely, and there would be no way of discerning which of these transactions in fact caused the overage, solely from the books and records of the holder. One would have to check the records of all the other possible combinations of affected contra-parties, *i.e.*, information external to the holder's books and records, to see who actually had the equivalent underage. *See also* Mas. Rep., 62-63.

Thus, the New York version of the primary rule not only produces a result which is illogical and inequitable, it depends on factual assumptions for which there is no evidence in the record.

---

[45] Affidavit of Robert Griffin, p. A-6 (May 5, 1988).

[46] Affidavit of Robert Griffin, p. A-3, *citing*, Exhibit IV, p. A-12.

IV. UNDER THE APPROACH SUGGESTED HERE, THE COURT WOULD NOT OVERRULE ANY PRECEDENT, NOR WOULD ANY STATE'S REASONABLE EXPECTATIONS BE FRUSTRATED; THUS THERE IS NO RETROACTIVITY ISSUE.

We have shown that the Court can reach an equitable result in this case, without overruling or substantially departing from its precedents, by returning to the basic principles underlying the decision in *Texas v. New Jersey*. Under this approach, the original implementing mechanisms of *Texas v. New Jersey* could still apply in the vast majority of unclaimed property dispositions, with the alternative adopted here applying only in circumstances where application of the old rule "derogates the reasons supporting it." *Pennsylvania v. New York*, 407 U.S. at 216 (Powell, J., dissenting).[47] If, like the majority in that case, the Court desires a brighter line rule, it can limit the applicability of its decision here to situations, like this one, where, because the property is inherently owner-and-address-unknown, it is *not* within the power or control of the individual holder or the state to reduce the incidence of "no-address" property to the insignificant levels to which the "backup" rule was meant to apply.

This solution to the present case would not only eliminate *stare decisis* questions, it would also resolve any "retroactivity" concerns. A decision based on the particular facts of this case will leave the states in the same posture as they were in *Texas v. New Jersey*, which was explicitly made

---

[47] *See also Pennsylvania v. New York*, 407 U.S. at 214 ("In some sense, there is some inconsistency between that result and our refusal in Texas to make the debtor's domicile the primary recipient of unclaimed intangibles.")

applicable to all of the funds at issue, some of which traced to periods long before the decision.[48] The judicial exercise of filling in a gap in existing case law does not trigger formal retroactivity analysis, and applying a ruling to the facts before the Court, which almost always are past facts, is the normal judicial practice.[49] That approach also avoids Delaware's "retroactivity" concerns, which relate to fact situations *not* before the Court involving its claims to garden variety unclaimed no-address property that it has already received under the *Texas v. New Jersey* backup mechanism.

Even assuming that the retroactivity analysis of *Chevron Oil Co. v. Husen*, 404 U.S. 97 (1971),[50] were applicable here, that analysis supports full retroactivity. As

---

[48] *See Pennsylvania v. New York*, 407 U.S. at 212-213.

[49] "In the ordinary case no question of retroactivity arises. Courts are, as a general matter, in the business of applying settled principles and precedents of law to the disputes that come to the bar." *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2442 (1991) (plurality opinion).

[50] "First, the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second, ... we must... weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation. Finally we [must] weig[h] the inequity imposed by retroactive application, for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity."
404 U.S. at 106-107. If any one of these factors is found lacking, the decision must be retroactively applied. *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990).

the Master correctly notes, a key factor in the Court's retroactivity analysis is a party's reliance on prior case law. Mas. Rep., 73. The record does not indicate that Delaware has taken any action -- other than suing New York -- in reliance on an assumption that the backup mechanism for small amounts of no-known-address property would be applied to the large amounts of no-known-owner property at issue here.[51] To adapt Delaware's own description of the similar situation in 1965, "there was no rule governing" this type of property, "and hence no expectations" as to which state had the superior claim. *See* Del. Br., 78. Nor has New York relied in taking custody of these funds on anything beyond its own state law, which attempts in the first instance to take possession of all unclaimed property of a holder who conducts any activity in New York.

Under New York's state law, it could take custody of all unclaimed property held by banks, financial institutions and business organizations *doing business* in the state.[52] It was

---

[51] As noted in our Exceptions, it is not entirely clear whether the Master is proposing to go beyond the facts of this case and also revise the old backup mechanism in all other cases. That is a separate issue from the adoption of an equitable rule for the present case, and would at most require a separate and distinct retroactivity analysis that would not alter the analysis for this case.

[52] *See, e.g.*, N.Y. ABAND. PROP. LAWS, Art. III, § 300(4). New York seems to be among those states, which at least in the past, have assumed that they perform a convenient service to other states by taking hold of the unclaimed property of holders within their jurisdiction, regardless of the rules of *Texas v. New Jersey*, with the expectation that other states will recover their appropriate shares through claims on the taking state. *See e.g.*, *O'Connor v. Sperry & Hutchinson Co.*, 379 A.2d 1378 (Pa. Commw. Ct. 1977), *aff'd*, 412 A.2d 539 (Pa. 1980); *New Jersey v. Chubb Corp.*, 570 A.2d 1313 (N.J. Super. 1989). *See also* N.Y. Br., 82 (state takings voidable by other states).

these broad provisions of New York law which enabled New York to seize all of the unclaimed "overages" held by banks, brokerages, and depositories, without regard to their state of incorporation, their status as creditors, or even their "trading address". For New York, this state law rule worked well, at least until Delaware filed suit. Only then, was New York faced with the obvious problem that its state statute did not comport with the Court's case law, either in terms of legal principles or implementing mechanisms.

New York concedes that it is "[t]he core principle of... escheat jurisprudence, that a state lacks the jurisdiction to unilaterally cut off the rights of other states asserting superior claims to the property .... Accordingly, New York's escheats ... [under its law] were voidable, subject to the rights of states claiming the property." N.Y. Br., 82.[53] Yet, instead of conceding that any other state has superior rights here, New York responded with its "creditor-broker" theory, which, as the Master clearly demonstrates, is a manufactured creature that bears no resemblance to the facts or the equities of the Court's primary distribution mechanism for address-known property. Mas. Rep., 58-68, 73 n. 66.

In its unilateral takings, New York clearly was not generally applying or relying on a "state of incorporation" rule, because that rule would have sent almost all the brokers' funds to Delaware. Only when the large amount of unclaimed overages held by the New York domiciled Depository Trust Corporation (DTC) was brought into the fray, did New York suddenly become interested in state of incorporation -- as to DTC. Unfortunately for New York, this later round of post

---

[53] Under New York law all of its takings are merely custodial, and are always subject to claims. *See* Memorandum of State Executive Department Division of Budget, "Unclaimed Property -- Simplifying Administration," 1980 New York Laws 1709, 1710; N.Y. Br., 2.

hoc rationalization placed it in a difficult logical box. If, as it asserted against Delaware's claim to brokerage funds, it had been relying on a "creditor-broker" theory to support its initial taking of unclaimed property under the primary mechanism of *Texas v. New Jersey*, that "creditor-broker" theory would have covered most of DTC's unclaimed dividend and interest payments regardless of DTC's state of incorporation. This is true because those dividend and interest payments are almost always owed to one or more "participants" in DTC who are themselves brokers and banks whose addresses, all over the country, are well known to DTC. *See* Mas. Rep., 61 n.53.

In short, the initial foundation of New York's taking of the unclaimed property involved here was its own broad statute -- this and only this can serve as the basis for judging New York's reliance interests. New York's creative efforts to sanctify its actions *nunc pro tunc* through selective use of the Court's terminology, under theories crafted solely for the purposes of this litigation, does not rise to the level of a protected reliance interest. Because New York's abandoned property statute and its actions in no way derived from the Court's prior precedents, New York can claim no "settled expectations" based on precedent, or otherwise claim any equitable entitlement to keep what it had no right to take.[34]

While the absence of reliance alone defeats

---

[34] Of course, under the Master's approach or the equitable allocation approach, New York will be permitted to keep a major portion of the funds it collected from those doing business there. New York is the location of many principal executive offices, the issuer of many governmental securities, and has the largest average share of shareholders, brokerage offices, and registered representatives. *See* Appendix A to Exceptions of the States of Michigan, Maryland, and Nebraska, and the District of Columbia to the Report of the Special Master, No. 111 Orig., A-1 (May 1992).

prospectivity claims here,[55] none of the other *Chevron* factors support prospective-only treatment of a decision in this case. As discussed above, an equitable decision here does not require an overruling of precedent; rather the case can be decided within the principles and limits of *Texas v. New Jersey*. Even if this were considered a case of first impression, those principles, reiterated and reinforced by Congress's action rejecting *Pennsylvania v. New York*, not only "foreshadowed," but predicted a different equitable resolution in a case like this one.

Adopting the Master's approach, or the equitable allocation approach, will further, not retard, the equitable foundation of the Court's decision in *Texas v. New Jersey*. Certainly, in the words of *Chevron*, a "substantial inequitable result[]" would occur if the half-billion or more dollars involved in this case were distributed to states solely on the basis of convenience and without regard to equity.

As the Master noted, any burden on New York is largely one it "imposed on itself" by taking a "calculated gamble." Mas. Rep., 76 n.68. And, neither New York nor Delaware can assert that a taking under the backup mechanism gave them either a vested, long term interest or comfortable entitlement to keep vast amounts of unclaimed property. The Court made clear in 1965 that the backup rule merely "cut off the claims of private persons only." 379 U.S. at 682. Property received under that rule was always subject to "superior" claims from other states, including claims derived from laws enacted after such funds were received by the state of incorporation. *Id.*

New York admits that its policy was to collect all it

---

[55] *Ashland Oil, Inc. v. Caryl*, 407 U.S. 916 (1990).

could in "voidable" escheats, subject to superior claims. N.Y. Br., 82. Now the time has come for New York to bear the responsibilities to the other states entailed by that policy. As a result of the decision in this case, other states' superior claims to past unclaimed property will be established, just as they were in *Texas v. New Jersey*. It is neither unexpected nor unfair that New York's voidable escheats yield to the Court's determination of superior state claimants under its longstanding principles of equity among the states.

CONCLUSION

For the reasons stated in the Exceptions previously filed by the Undersigned States, and in this Reply, the Court should either

(1) adopt the recommendations of the Special Master and direct New York to pay any "excess receipts" attributable to distributions with respect to securities, collected by New York from securities brokers, depositories, banks, and any other agents or intermediaries for securities investors, to each other state in which the issuer of the underlying security had its principal executive office at the time of the respective distributions, or

(2) adopt in principle the "equitable allocation" approach for the unclaimed property at issue in this case, based on the proportions in each state of the commercial activities which gave rise to such unclaimed property, namely, the securities investment activity of each state's citizens, and remand the case to the Special Master to recommend an appropriate decree implementing that approach.

Respectfully submitted,

John Payton
Corporation Counsel
Charles L. Reischel
Deputy Corporation Counsel
Lutz Alexander Prager
Assistant Deputy Corporation Counsel
District Building, Room 305
Washington, D.C. 20004
202-727-6252

Attorneys for the District of Columbia

Don Stenberg
Attorney General
Dale A. Comer
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
402-471-2940

Attorneys for the State of Nebraska

James F. Flug*
Lee E. Helfrich
Martin Lobel
Lobel, Novins, Lamont & Flug
1275 K Street, N.W.
Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan,
Frank J. Kelly,
Attorney General, and
Maryland,
J. Joseph Curran, Jr.
Attorney General

* Counsel Of Record

July 1992

Supreme Court, U.S.
FILED
JUL 27 1992
OFFICE OF THE CLERK

NO. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

vs.

STATE OF NEW YORK,

Defendant.

REPLY OF THE STATE OF NEW YORK TO THE EXCEPTIONS AND BRIEF OF THE STATE OF DELAWARE AND THE EXCEPTIONS OF THE STATES OF MICHIGAN, *ET AL.*

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

July 27, 1992

TABLE OF CONTENTS

	Page
SUMMARY OF ARGUMENT	1
ARGUMENT	4
POINT I-	
DELAWARE IS NOT ENTITLED TO JUDGMENT AGAINST NEW YORK	4
A. The Creditors Of The Abandoned Property Held By New York's Debtor Brokers Are Brokers And Banks With New York Addresses On The Debtors' Books	5
B. The Debtor Brokers' Abandoned Property Holdings Are Caused By Nominee Float, A Cause Which Preserves The Creditors' Identities On The Debtors' Books	7
POINT II -	
THE "EQUITABLE ALLOCATION APPROACH" IS A GROSS DOWERING OF UNCLAIMED PROPERTY TO ALL THE STATES IN VIOLATION OF THE *TEXAS V. NEW JERSEY* AND *PENNSYLVANIA V. NEW YORK* RULES	12
A. The "Equitable Allocation Approach" Would Require The Court To Expressly Depart From The *Texas v. New Jersey* Escheat Rules	12

Page

B. The "Equitable Allocation Approach" Seeks A Departure From The *Texas* Rules For Reasons Previously Rejected In *Pennsylvania v. New York* 16

C. The "Equitable Allocation Approach" Raises Even Greater Administrative Complexities Than The Special Master's Report 20

D. The Special Master Correctly Concluded That The "Equitable Allocation Approach" Is Best Addressed To Congress 21

CONCLUSION 23

TABLE OF AUTHORITIES

Cases	Page
Chevron Oil v. Huson, 404 U.S. 97 (1971)	22
Nebraska v. Wyoming, 325 U.S. 589 (1945)	22
Payne v. Tennessee, 111 S. Ct. 2597 (1991)	21
Pennsylvania v. New York, 407 U.S. 206 (1972)	*passim*
Planned Parenthood of Southeastern Pennsylvania v. Casey, 60 U.S.L.W. 4795 (U.S. June 30, 1992) (Nos. 91-744 and 91-902)	21, 22
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*

FEDERAL STATUTORY PROVISIONS

United States Code:

Section 2501, *et seq.*, of Title 12	19
Section 2501(1) of Title 12	20

NO. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

REPLY OF THE STATE OF NEW YORK TO THE EXCEPTIONS AND BRIEF OF THE STATE OF DELAWARE AND THE EXCEPTIONS OF THE STATES OF MICHIGAN, *ET AL.*

SUMMARY OF ARGUMENT

Both New York and the plaintiff State of Delaware except to the Special Master's Report because it violates the Court's debtor-creditor rules set down in *Texas v. New Jersey*. The Report requires that unclaimed securities distributions held by financial institutions as the record owners escheat to the issuers' jurisdictions even though the issuers are not the debtors of this property after paying the record owners.

Delaware's bid for judgment against New York is based on a narrow factual claim under the *Texas* backup rule that the creditors of the property held by New York's debtor brokers are unknown and that New York is relying upon a statistical presumption to locate the creditors of this property in New York. This claim is untenable on the present evidentiary record. The creditors of unclaimed distributions held by debtor brokers *are* identified on the debtor brokers' books and records because the abandoned property is the result of nominee float. *See* Exceptions of the State of New York to the Report of the Special Master at 26-34. New York escheats this property from debtor brokers in New York, in conformity with the *Texas* primary rule, since the creditors identified on their books are New York-addressed entities in virtually all instances. New York's proposed use of statistical evidence is *not* for the purpose of creating a presumption that the creditors are in New York. It is solely intended to establish that in virtually all instances the creditors' addresses *actually on the debtor brokers' books* are in New York. *See* Brief in Opposition to Motion for Leave to File Complaint, Exhibit A (Affidavit of Robert Griffin, Director of Audits, Office of Unclaimed Funds, Office of the New York State Comptroller).

New York was not permitted to develop its factual basis for escheating this property under the *Texas* primary rule because the discovery allowed by the Special Master was limited to testing the validity of the intervenors' legal theories. The Court's recognition that fairness requires escheat in the first instance to the creditor's jurisdiction identified by the debtor's records entitles New York to a full opportunity to demonstrate that it satisfies the requirements of the *Texas* primary rule with regard to the property held by debtor brokers in New York.

The plaintiff-intervenor States of Michigan, Maryland and Nebraska, and the District of Columbia ("Michigan, *et al.*,"), argue in favor of their "equitable allocation approach or option,"[1]

---

[1] The "equitable allocation approach or option" was previously known as the "California, *et al.*," theory. It was redesignated by Michigan, *et al.*, after the Special Master rejected the theory and the former lead State of California, as well as the States of Ohio and Rhode Island, withdrew their support for it.

which they assert is preferable to the operation of the *Texas v. New Jersey* escheat rules or the Special Master's recommended departures from those rules. Michigan, *et al.*'s, "equitable allocation approach" was correctly rejected by the Special Master because it is inconsistent with *Texas v. New Jersey* and *Pennsylvania v. New York* and is administratively burdensome. The "equitable allocation approach" is a more overt, but equally radical departure from the Court's escheat precedents than that recommended by the Special Master. It also compounds the administrative problems inherent in the Master's result. Although the Special Master recognized the antipathy between the Michigan, *et al.*, "equitable allocation approach" and the Court's escheat precedents, he failed to appreciate that his own result suffers from the same or similar problems.

ARGUMENT

POINT I

DELAWARE IS NOT ENTITLED TO JUDGMENT AGAINST NEW YORK

Delaware's request for judgment against New York is based upon its misunderstandings of New York's legal position and the evidentiary record. First, Delaware asserts that all of the creditors of the unclaimed distributions held by New York's debtor brokers are unknown, thereby rendering the *Texas* primary rule inapplicable to this property. Second, Delaware characterizes New York's claim to this property as based upon a statistical presumption as to the creditors' locations similar to the approach rejected by the Court in *Pennsylvania v. New York*. *See* Exceptions and Brief for the State of Delaware at 83-86.

Delaware is wrong on both counts. Contrary to Delaware's assertion, the creditors of this property *are* identified on the debtor brokers' books and records, and New York's reliance on statistical proof is for the sole purpose of establishing that the creditors are *actually* located in New York. Since the Court has expressed a clear preference for the rights of the creditors' jurisdictions to escheat intangibles, and has permitted escheat by the debtor's domicile only as a last resort, New York should be given the opportunity to pursue discovery beyond that authorized by the Special Master to demonstrate its right to this property under the *Texas* primary rule.[2] *See* Exceptions of the State of New York to the Report of the Special Master at 77-81.

---

[2] Delaware also incorrectly suggests that New York requires debtor brokers to report the property owed to non-New York residents who cannot be located. *See* Exceptions and Brief for the State of Delaware at 18, 21, n.31. This is not New York's practice since such property is owed to the State of residence in accordance with the *Texas* primary rule. New York applies its abandoned property statute, which predates *Texas v. New Jersey*, in full compliance with the rules announced there governing the escheat of abandoned intangibles.

A. The Creditors Of The Abandoned Property Held By New York's Debtor Brokers Are Brokers And Banks With New York Addresses On The Debtors' Books

New York presented specific facts to demonstrate that New York-addressed entities based in New York are the creditors of the unclaimed distributions on the records of New York debtor brokers and, therefore, New York is entitled to escheat this property under the *Texas* primary rule. At the very outset of this case, New York introduced the Affidavit of Robert Griffin, the Director of Audits for the Office of Unclaimed Funds, Office of the New York State Comptroller. *See* Brief in Opposition to Motion for Leave to File Complaint, dated May 9, 1988, Exhibit A. The Griffin Affidavit was drawn from actual audits of New York debtor brokers conducted after 1985. Representative samples of the brokers' records established that the records can be used to reconstruct the transactions that generated the brokers' abandoned property holdings, and that the reconstructed records would show that the creditors are brokers and banks with New York addresses in almost every instance.[3] This is consistent with the fact that the manual delivery of certificated securities between New York brokers and banks, which is the cause of the brokers' abandoned property (nominee float), is conducted through the National Securities Clearing Corporation ("NSCC"), a group that consists almost entirely of New York-addressed creditor entities. Griffin Affidavit at A-6; *see also* Shearer Dep. at 80 (stating that Merrill Lynch uses the NSCC service for the delivery of physical certificates only to locations in New York City).

New York's right to escheat the unclaimed distributions of New York debtor brokers under the *Texas* primary rule is not based upon a statistical presumption that the creditor brokers and

---

[3] In response to Delaware's First Interrogatories, New York set forth the amounts of unclaimed distributions it escheated between 1972 and 1988 from New York debtor brokers incorporated in Delaware. *See* Exceptions and Brief for the State of Delaware at 14, n.17. Contrary to Delaware's assertion, the figures included debt securities.

banks are located in New York. *See* Exceptions and Brief for the State of Delaware at 83; *also* at 19. New York's reliance on statistical evidence is for the sole purpose of demonstrating that the creditors' addresses actually present on the debtors' books are in New York. This would be done by means of a statistically valid sampling of the debtors' books to identify the actual creditors of the unclaimed distributions, and an extrapolation from the results to establish that the creditors of this property are New York-addressed brokers and banks. The reliability of the results obtained by statistical sampling has been recognized by the Court in other contexts. *See* Exceptions of the State of New York to the Report of the Special Master at 81.

Thus, New York's reliance on statistical evidence has two predicates: that it is possible to apply the last known address provision of the *Texas* primary rule to the property held by debtor brokers; and that New York can demonstrate thereby that it is the State of the creditors' last known address on the books of New York debtor brokers in virtually all instances. The only alternative to the use of statistical proof would be the tracing of each and every transaction on the debtors' records. This would be enormously time consuming and require the expenditure of considerable State funds and manpower to establish the precise identity of each creditor. Such expenditures of the State's resources would not accrue to the benefit of its citizens since the creditors identified in this manner would be entitled to the property. Moreover, the State would, in effect, be doing the work of the brokers who have already made the determination not to trace the transactions or make claims for the property. Given the right of the creditor's jurisdiction to escheat abandoned intangible property under the *Texas* primary rule whenever possible, and that the use of statistical proof is an efficient and reliable means of implementing the primary rule in this case, New York should be permitted to pursue its claim to the property held by New York debtor brokers as the jurisdiction of the creditors' last known address.

B. The Debtor Brokers' Abandoned Property Holdings Are Caused By Nominee Float, A Cause Which Preserves The Creditors' Identities On The Debtors' Books

Evidentiary support for New York's legal arguments under the *Texas* primary rule was provided by the brokers' testimony that the cause of their unclaimed distributions is nominee float. *See* Exceptions of the State of New York to the Report of the Special Master at 26-34. Because of the particular characteristics of nominee float, the creditors of the resulting unclaimed distributions can be determined from the debtor brokers' books and records, whereas the creditors of DTC's Cede float can not. Delaware's failure to perceive the difference between nominee float and Cede float, and its further assertion that New York has never explained the difference, is simply wrong. *See* Exceptions and Brief for the State of Delaware at 85.

New York devoted a major portion of its main brief (as it did in its submissions to the Special Master) detailing the evidentiary record with particular emphasis on the different operations of financial institutions giving rise to unclaimed property. *See* Exceptions of the State of New York to the Report of the Special Master at 17-34. Nominee float, the cause of the brokers' unclaimed distributions, results when physical certificates are exchanged between a broker and another broker or bank to settle a trade in that security. The selling broker's records can be used to reconstruct the trade and trace the delivery to the purchasing broker or bank. *See* Report of the Special Master at Appendix B, Fact (62), at B-18 (referring to use of the brokers' overage accounts, daily stock records, and delivery tickets to trace the trade). Since the purchasing broker owns the security, it is the creditor, identified on the selling broker's books, of a distribution paid to the debtor (selling) broker after the record date.*

---

* The custodial service's division of a bank also sends out physical certificates to settle trades for its customers. Unlike brokers, however, the bank does not participate in the trade and does not record the identities of potential creditors.

By contrast, DTC's Cede float is the by-product of a withdrawal procedure whereby DTC's participants can obtain physical certificates on an emergency basis. Since the ownership of the certificate does not change until after the participant has traded it, a transaction unknown to DTC, the creditor of a distribution wrongly paid to DTC cannot be determined from its records.

Delaware's assertion that the unclaimed distributions held by debtor brokers are owner unknown because they are also caused by various errors, including missed transfers and out-of-balance conditions, is refuted by the evidentiary record. *See* Exceptions and Brief for the State of Delaware at 84.[5] This misunderstanding over the cause of the brokers' abandoned property is shared by the Special Master, and led to his erroneous conclusion that the property is owed to the *debtor* brokers' own customers but remains unpaid because the errors cannot be corrected. Report at 62, n.54, and 66, n.57. The property is in fact owed to the *creditor* brokers and banks that purchased the underlying securities (nominee float) for their customers (the beneficial owners), and paid their customers the distributions to which the customers were entitled with the brokerages' own funds.[6]

The testimony relied on by Delaware to establish that errors, missed transfers and out-of-balance conditions cause unclaimed

---

[5] Delaware's attempt to portray the securities industry as generally inefficient in paying distributions is remarkable in view of the fact that 99.98% of the distributions reach their correct destinations, and the individual amounts that do not are relatively small. *See* Exceptions and Brief for the State of Delaware at 16. As the Special Master concluded: "In a tribute to the efficiency of the distribution system, such payments indeed make their way through the system . . . without incident in the overwhelming percentage of instances." Report at 10. *See also* Motion for Leave to File Brief and Brief of *Amici Curiae* at 21: "The existence of unclaimed distributions is an unintended by-product of securities processing - an irritant to the holders who attempt to develop error-free systems for processing distributions."

[6] Indeed, Delaware's concession that there are no unclaimed distributions on book-entry-only securities (certificateless issues), confirms the conclusion that it is the movement of the physical certificates themselves, not errors in related bookkeeping, that causes the brokers' abandoned property. *See* Exceptions and Brief for the State of Delaware at 15.

distributions establishes only that these are causes of initial overages, not that they cause property to escheat. *See* Exceptions and Brief for the State of Delaware at 84, n.96. The record owners testified that such overages are transient in nature because they are caught by their computerized systems and corrected. *See* Exceptions of the State of New York to the Report of the Special Master at 23-24, 27-28, and 30. In addition, the record owners' customers alert them to discrepancies. *Id.* Thus, when the debtor brokers report the property to New York at the end of the dormancy period, routine overages due to errors, missed transfers and out-of-balance conditions have been corrected and the residue of the property is attributable to nominee float. The testimony refuting Delaware's (and the Special Master's) conclusion that the property in question is owed to the unidentified customers of the debtor brokers because of recordkeeping errors is corroborated by the *amici curiae*:

> Thus, as explicated in the discovery proceedings before the Master, the unclaimed distributions held by financial institutions are generally not attributable to the fact that a customer of that financial institution has not been paid its distribution.

Motion for Leave to File Brief and Brief of *Amici Curiae* at 20, n.13.

Delaware's next argument flows from the initially correct observation that even if the brokers' unclaimed distributions are caused by nominee float, their records can only be used to identify "the *first* bearer holder of the certificate," not the owner of the certificate on the record date. Exceptions and Brief for the State of Delaware at 84-85. Delaware then asserts, incorrectly, "that *that* person's identity is the relevant inquiry" - an argument it incorrectly attributes to New York as well. *Id.* at 85. On this point, Delaware's position is aligned with the erroneous conclusion of the Special Master "that in applying the primary rule, the last-known-addresses of the beneficial owners, not other intermediaries will control." Report at 67.

As the evidentiary record established, however, the customers (beneficial owners) of the record owners (creditor brokers and

banks) are not owed anything. They are paid the distributions by their brokers and banks based on their increased ownership positions in the underlying securities. The distributions are in fact owed to the record owners who did not receive them because of nominee float. If there is a later bearer holder, it is a result of another, more distant, transaction related to another contractual relationship and has nothing to do with the debtor-creditor relationship involved with the unclaimed funds. As *amici curiae* state:

> Brokerage firms, banks, and depositories have made a substantial commitment in compliance procedures and computer systems to ensure that beneficial owners are paid the distributions to which they are entitled. The distribution system - comprising legal, accounting, and technological components - is highly effective, in part because financial institutions generally credit their customers' accounts on the payment date, whether or not the financial institution has received payment of the distribution from the issuer.

Motion for Leave to File Brief and Brief of *Amici Curiae* at 20; *see also* Exceptions of the State of New York to the Report of the Special Master at 30-31.

Moreover, the *Texas* primary rule requires that the property escheat to the jurisdiction of the creditor's last known address identified by the debtor's books and records. This rule applies regardless of whether the creditor so identified is another financial institution or an individual and does not require the debtor to look beyond that identification. As New York has already argued, requiring the debtor to determine whether the creditor has ultimate beneficial ownership interests in the property would defeat the Court's goal of creating a primary rule of escheat whose operation does not depend on the particular facts of each case. *See* Exceptions of the State of New York to the Report of the Special Master at 76 (citing *Texas v. New Jersey*, 379 U.S. at 679; *Pennsylvania v. New York*, 407 U.S. at 215); *see also* Motion for Leave to File Brief and Brief of *Amici Curiae* at 11-12.

In addition, since the debtor brokers cannot determine whether the creditors identified on their books are also beneficial owners, the property held by debtor brokers would never escheat under the *Texas* primary rule if the creditors were defined by the nature of their underlying ownership interests. *See* Exceptions of the State of New York to the Report of the Special Master at 77-79. Accordingly, Delaware's position (and that of the Special Master), that the primary rule does not apply to the first creditor identified by the debtor's books would necessitate the escheat of all of this property under the *Texas* backup rule, a result which the Court has expressly disfavored. 379 U.S. at 682.

Finally, Delaware erroneously asserts that "[i]t was undisputed on the record that brokers and banks cannot identify the creditor who is owed the unclaimed distributions involved in this case." Exceptions and Brief for the State of Delaware at 84. As the Griffin Affidavit established, tracing nominee float is possible but would require careful research on the part of the debtor brokers. These entities testified, however, that they do not research any overages beyond the corrective steps attached to locating errors and other bookkeeping problems. They wait, instead, for the creditor brokers and banks to come forward with a claim, at which point they undertake the research needed to validate it. Hence, if the creditor brokers do not make a claim because the amounts of the particular items involved are small, the debtor brokers keep the funds and eventually escheat them without knowing the creditors' identities. This does not mean, as Delaware contends, that the creditors are not identifiable from the debtor brokers' books. It simply means that the debtor brokers have not made the effort to trace the overpayment. *See* Exceptions of the State of New York to the Report of the Special Master at 81.

Accordingly, the evidentiary record and New York's factual submissions demonstrate that the unclaimed distributions held by debtor brokers must be treated differently for escheat purposes than those held by banking institutions and DTC. Since the debtor brokers' holdings are attributable to their sales of certificated issues and the manual delivery of the underlying

physical certificates (nominee float), the creditors can be identified from the debtors' books and records. New York is requesting the opportunity, consistent with the Court's recognition of the superior rights of the creditor's jurisdiction, to demonstrate that it is entitled to escheat this property under the *Texas* primary rule. The limited discovery authorized so far in this case related only to the threshold issue of whether the intervenors' legal theories were consistent with the Court's escheat precedents. For these reasons, Delaware's request for judgment against New York should be rejected.

POINT II

THE "EQUITABLE ALLOCATION APPROACH" IS A GROSS DOWERING OF UNCLAIMED PROPERTY TO ALL THE STATES IN VIOLATION OF THE *TEXAS V. NEW JERSEY* AND *PENNSYLVANIA V. NEW YORK* RULES

In a sweeping plea to the Court's "equitable discretion," the Michigan, *et al.*, States propose that unclaimed securities distributions be allocated to all the States according to each State's alleged share of the commercial activities of the nation's beneficial owners. Michigan, *et al.*, Brief at 3-4, 17-18. The Special Master rejected this "equitable allocation approach/option" on *stare decisis* grounds as completely inconsistent with *Texas v. New Jersey* and *Pennsylvania v. New York*, and because he believed that an approach of such broad generality was better suited for Congressional action than the Court's judicial decision-making. Report at 50-55. The Master's rejection of the "equitable allocation approach" on these grounds was entirely correct. The Master failed to perceive, however, that his own deconstruction of the *Texas* rules was proposed for reasons similar to those underlying the "equitable allocation approach" and raises comparable legal and practical objections.

A. The "Equitable Allocation Approach" Would Require The Court To Expressly Depart From The *Texas v. New Jersey* Escheat Rules

In *Texas v. New Jersey* the Court established clear rules to govern the escheat of all types of intangible obligations based

upon the locations of the creditors and debtors of the property. Under the *Texas* primary rule, the property escheats, as the creditor's asset, to the creditor's jurisdiction identified by the debtor's books and records. 379 U.S. at 681-682. Under the backup rule, the debtor's domicile may escheat the property only in the event that an attempted application of the primary rule fails. *Id.* at 682.

Michigan, *et al.*'s, "equitable allocation approach" bears no resemblance whatsoever to the *Texas* rules. Under the "equitable allocation approach," all of the property in question would escheat to all of the States according to a gross formula approximating where beneficial owners own, buy, and sell their securities. Michigan, *et al.*, Brief at 19-20. The formula would be derived from three purported indicators of individual investment activity within a State: number of shareholders, branch offices of brokers and registered brokerage representatives. *Id.* The average of a State's percentage of these variables would be applied to the pool of unclaimed securities distributions to determine each State's proportionate share. *Id.*

Michigan, *et al.*, contend that the Court should adopt the "equitable allocation approach" because it serves as a "global proxy" for the location of the missing beneficial owners whose commercial activities in the underlying securities were the proximate cause of the unclaimed distributions. Michigan, *et al.*, Brief at 20. These States propose that the Court reject the application of the *Texas* rules to the particular type of intangible property involved in this case because that would not disperse the property to all the States. *Id.* at 2. They also criticize the Special Master for manipulating the *Texas* backup rule for the same reason.[7] *Id.* at 2-3, 7-9, 14. Although Michigan, *et al.*,

---

[7] Specifically, Michigan, *et al.*, conclude, as do New York and Delaware, that the Master's adoption of the Texas, *et al.*, and Alabama, *et al.*, position that the securities issuers are debtors after paying distributions to the record owners was a calculated and inappropriate first step in totally revamping the *Texas* backup rule. Michigan, *et al.*, Brief at 3, 7-9, 14. The second step, changing the rule's locational surrogate from state of incorporation to chief executive office, completed the process of converting the backup rule from a "cleanup rule" or "rule of convenience" into a mechanism for dispersing the property in question to all the States. *Id.*

correctly except to the Master's misapplication of the *Texas* rules based upon his adoption of the Texas, *et al.*, and Alabama, *et al.*, issuer-debtor theory, the "equitable allocation approach" is equally wrong. Michigan, *et al.*'s, purported appeal to the equitable principles that undergird the *Texas* primary rule is fundamentally misconceived, and their rationale for departing from the *Texas* rules - dispersal of the property to all the States - is in direct conflict with *Pennsylvania v. New York*.

The *Texas v. New Jersey* escheat rules are not broad-based vehicles for allocating abandoned intangibles among the States by volume of commercial activity. Although the Court observed that the application of the *Texas* primary rule "will tend to distribute escheats among the States in proportion to the commercial activities of their residents" (379 U.S. at 681), it viewed this as a favorable consequence of the rule's adoption, not as the reason for the rule itself. Indeed, if the Court had intended to create a mechanism for allocating abandoned property to the States according to their commercial activities, it would not have chosen to do so by announcing a rule which depended upon the adequacy of the debtors' books to identify the creditors. A more direct path to allocation would certainly have been chosen had this been the Court's principal concern.

The Court formulated the *Texas* primary rule with two concerns in mind: fairness - in the sense of treating the debt as the creditor's asset; and certainty - a clear rule that would be applied to all types of intangible property. 379 U.S. at 678, 680. Accordingly, the Court conferred the primary right to escheat abandoned intangibles on "the State of the creditor's last known address as shown by the debtor's books and records." *Id.* at 680-681. The Michigan, *et al.*, "equitable allocation approach," by contrast, violates the principle of fairness embodied in the primary rule by permitting the jurisdictions of unidentifiable beneficial owners to escheat even though there is no last known address or other demonstrable nexus connecting those jurisdictions to the creditors of the property.[8] The "equitable allocation

[8] As New York has also demonstrated, the beneficial owners of the underlying securities are not the creditors of the property because they are routinely paid

(Footnote continued)

approach" also dispenses with the certainty and convenience of relying upon the debtors' books and records to identify the creditors and substitutes complex and administratively burdensome allocation formulas. As the Special Master correctly concluded, this allocation approach is a "free-form effort" which "totally recasts" the *Texas* rules. Report at 52.

Even if the Court were inclined to consider the "equitable allocation approach" despite its pervasive negation of precedent, it should be rejected because it accomplishes a random redistribution in which any particular item of unclaimed property is divided in a manner completely unrelated to the commercial activities that gave rise to it. Nor would this redistribution balance out in the aggregate. The fallacy of the "equitable allocation approach" is that it seeks to correlate certain indicia of the brokers' commercial activities in each State - number of customers, branch offices and registered brokerage representatives - with the unclaimed distributions and the beneficial owners of the underlying securities. However, brokerage data relating to *all* securities cannot possibly be used to determine a State's proportionate share of the *relevant* commercial activities. As established by the evidentiary record, brokers conduct enormous numbers of daily transactions for their customers,[9] but only transactions around a record date, which may not be timely recorded by the issuer's transfer agent, are even remotely relevant to the incidence of unclaimed distributions. The brokers' transactional activity also includes high volume trades for large institutional customers of custodian banks, such as pension funds and insurance companies. These

---

all of the distributions to which they are entitled by their brokers or banks. These entities are the only creditors. *See* Exceptions of the State of New York to the Report of the Special Master at 30-34; *see also* Motion for Leave to File Brief and Brief of *Amici Curiae* at 20. Thus, even if the equitable allocation approach were rationally related to the transactions or locations of the beneficial owners, it would not satisfy the *Texas* primary rule's concern for determining the creditors' jurisdictions.

[9] For example, Prudential-Bache has approximately 300,000 different securities on its books and conducts between 30,000 and 40,000 trades a day. *Cirrito* Dep. at 18, 167.

institutions conduct their trading activity from locations completely unrelated to the beneficial owners, who may be anywhere and who have no connection with the actual transactions conducted on their behalf. *See* Scott Dep. at 29. Finally, the transactions that generate Cede float, the cause of abandoned property at DTC, cannot be identified from the commercial activities of beneficial owners at the brokerage level. These facts, coupled with the undisputed recognition that relatively few transactions give rise to unclaimed distributions (only 0.02% of all distributions become abandoned), confirm the conclusion that the "equitable allocation approach" completely ignores the creditors of the unclaimed property.

> But this [approach] not only moves from an individual security to aggregates, it stops not far short of a *reductio ad absurdum* of this position: distribute the funds based on population.

Report at 53.[10]

Michigan, *et al.*, cannot, therefore, succeed on their claims without abrogating *Texas v. New Jersey*. Accordingly, their claims should be dismissed.

B. The "Equitable Allocation Approach" Seeks A Departure From The *Texas* Rules For Reasons Previously Rejected In *Pennsylvania v. New York*

Michigan, *et al.*, request adoption of the "equitable allocation approach" as a means of avoiding the Special Master's recommendation that all of the property in question escheat under the *Texas* backup rule. These States argue that this result is inconsistent with the Court's intention to have intangibles

---

[10] The Special Master also addressed his comments to an alternate approach now referred to by Michigan, *et al.*, as a "holder-by-holder" allocation. *See* Michigan, *et al.*, Brief at 20. This method would require the use of separate allocation formulas for every brokerage firm, rather than combined statewide formulas. The Special Master recognized that this allocation method did not cure the fundamental misconceptions inherent in the "equitable allocation approach," and Michigan, *et al.*, concede that this method would also be administratively burdensome. Michigan, *et al.*, Brief at 20. *See* Section I.C., *post*.

escheat under the primary rule, and could result in a windfall to Delaware if the Court adopted the Master's definition of the issuer as the debtor but retained the state of incorporation provision of the backup rule. Michigan, *et al.*, Brief at 11. However, the Court rejected similar arguments in *Pennsylvania v. New York* as justification for departing from the *Texas* rules. In addition, it is clear that the *Texas* rules can be strictly applied in this case without creating a windfall or the disproportionate escheat of property under the backup rule.

In *Pennsylvania v. New York* the Court refused to depart from the literal application of the *Texas* primary rule on the ground that the debtor in that case, Western Union, did not routinely record the addresses of its money order creditors. The Court concluded that neither making the debtor's domicile the primary recipient of unclaimed intangibles, nor the likelihood of a windfall to that jurisdiction, outweighed the need for clear rules to be applied in all escheat cases.

> In other words, to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided - that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

407 U.S. at 215 (citing *Texas v. New Jersey*, 379 U.S. at 679).

Michigan, *et al.*, assert, however, that because the aggregate dollar amounts are greater here than in *Pennsylvania v. New York*, the Court should conclude that this case is factually distinguishable and not controlled by precedent. Michigan, *et al.*, Brief at 11-12. The Special Master's correct response to this argument is that the Court "expressly considered and rejected in *Pennsylvania v. New York* a focus on dollar amounts" precisely because of its overriding concern with avoiding the uncertainty that such an approach would introduce. Report at 51-52. Predication of the *Texas* rules on subjective evaluations of dollar amounts would convert the rules into breeding grounds for

litigation over whether a "reasonable demarkation [sic] line has been crossed." *See* Michigan, *et al.*, Brief at 11.

Equally untenable is Michigan, *et al.*'s, contention that *Pennsylvania v. New York* is factually distinguishable because it did not involve escheat of all unclaimed money order funds under the *Texas* backup rule. Michigan, *et al.*, Brief at 11-12. In *Pennsylvania v. New York*, an indeterminate number of creditors could be identified by examining Western Union's individual money order applications (as opposed to its ledger books which contained no identifying creditor information). In this case, if the creditors are defined as the "ultimate intended beneficial owners" in conformity with the Master's Report, then all of the property in question must escheat under the *Texas* backup rule since the debtors' books and records do not identify such individuals or entities. However, like analyzing aggregate dollar amounts, looking to the proportion of unclaimed funds that will be allocated pursuant to the backup rule rather than the primary rule destroys any semblance of certainty in applying the *Texas* rules. In addition, the Special Master noted that "there is no reason to believe that the percentage of unclaimed funds relative to the total funds that pass through the securities distribution system is any greater here than in the Court's prior cases." Report at 52. Thus, the Master correctly concluded that this case is, in reality, "no different." *Id.* at 51. Moreover, Michigan, *et al.*, never explain why the factual distinctions upon which they rely should lead to different legal rules.

This does not mean, however, that the Special Master was correct that all of the property in this case should escheat under the *Texas* backup rule. Indeed, Michigan, *et al.*'s, attempt to circumvent *Pennsylvania v. New York* builds upon the Master's erroneous conclusion that the creditors of the property in question are the "ultimate beneficial owners" of the underlying securities rather than the creditors actually identified by the debtors' books. Michigan, *et al.*, simply bootstrap their arguments in support of the "equitable allocation approach" to this erroneous definition of the creditors. They urge the Court to dispense with the primary rule in this case because beneficial ownership interests are not evident from the debtor brokers'

books, thereby resulting in the escheat of this property under the backup rule pursuant to the Master's Report.

However, as New York has demonstrated, if the creditors of the property in question are defined in accordance with the *Texas* primary rule, then all of the property does not escheat under the backup rule. It is New York's position, and the one adopted by all the States in their own abandoned property laws, that the primary rule must be applied to the creditors of the debt obligation identified by the debtors' books, not to unidentifiable individuals or entities with ultimate beneficial ownership interests. *See* Exceptions of the State of New York to the Report of the Special Master at 56-60. Since debtor brokers do maintain records which identify their creditors - the brokers and banks entitled to claim the distributions erroneously paid to the debtor brokers - the *Texas* primary rule can be utilized to determine those jurisdictions with the right to escheat unclaimed distributions in the hands of the brokerage firms. *Id.* at 33-34. Accordingly, a large percentage of the property in question can continue to pass under the *Texas* primary rule simply by defining the creditors correctly. This eliminates Michigan, *et al.*'s, rationale for the "equitable allocation approach" as a means of preventing resort to the backup rule for the escheat of all unclaimed distributions.[11]

Michigan, *et al.*'s, alternate argument that *Pennsylvania v. New York* "should carry little, if any, weight" is also meritless. Michigan, *et al.*, Brief at 12-13. The dissent by three Justices in *Pennsylvania v. New York* was confined to "a relatively minor but logical deviation" in the *Texas* primary rule for Western Union's unclaimed money order proceeds. 407 U.S. at 219-220. Two years later, when Congress essentially adopted the dissenters' position for unclaimed sums payable on money orders, travelers checks, or other similar instruments other than third party bank checks (*see* 12 U.S.C. §§ 2501, *et seq.*), it did so based upon the express finding

---

[11] The remainder of the property in question - the unclaimed distributions held by DTC and custodian banks - must escheat under the *Texas* backup rule because the records of these entities contain no identifying information concerning the creditors.

that a substantial majority of the purchasers reside where the instruments were purchased. 12 U.S.C. § 2501(1). Congress did not make this law applicable to distributions on securities or otherwise alter the general applicability of the last known address provision of the *Texas* primary rule.

C. The "Equitable Allocation Approach" Raises Even Greater Administrative Complexities Than The Special Master's Report

The substantial administrative burdens surrounding implementation of the Special Master's recommendation that all of the property in question escheat under the *Texas* backup rule to the States where the securities issuers are located, rather than to the jurisdictions of the record owners, have already been described to the Court. *See* Exceptions of the State of New York to the Report of the Special Master at 65-69. *See also* Motion for Leave to File Brief and Brief of *Amici Curiae* at 13-20, expressing the concerns of the Securities Industry Association, The New York Clearing House Association, American Bankers Association, and The Depository Trust Company, over reporting the property in question to the issuers' jurisdictions.

Michigan, *et al.*'s, "equitable allocation approach" generates many of the same problems as the Master's recommendation since both are ultimately tied to the goal of dispersing the property in question to all the States. However, the Michigan, *et al.*, "equitable allocation approach" adds a further dimension to these complexities because it is based on an allocation by distribution rather than by issuer. Accordingly, every distribution on every issue is divisible among 51 jurisdictions, unlike the Master's recommendation which sends all distributions on a particular issue to the issuer's jurisdiction. In addition, the allocation formulas are based upon constantly shifting data such as each State's percentages of shareholders, brokers' branch offices, and registered brokerage representatives. Record owners would have to compile and review such data on a regular basis and revise the formulas for every distribution and distribution period in order to implement the "equitable allocation approach." Finally, severe difficulties would hamper the ability of individuals (or a State

asserting a superior claim under the *Texas* primary rule) to claim their property, since they must determine the percentage allocated to each jurisdiction and bring 51 claims. *See* Report at 55.[12]

Although Michigan, *et al.*, assert that they have ready answers for these administrative concerns, they have not provided any. *See* Michigan, *et al.*, Brief at 25-29. Instead, they maintain that their approach is open "to flexible implementation procedures yet to be devised by the states," an argument they have repeatedly fallen back upon when pressed for details. *Id.* at 27. The idleness of these States' responses is apparent from their suggestion that the allocation formulas could be updated at convenient intervals, such as every 5 or 10 years. *Id.* at 29. Such a contrived deference to convenience is clearly at the expense of applying the "equitable allocation approach" with the benefit of any reasonably accurate or even relevant data. Therefore, Michigan, *et al.*, have not countered the Report's conclusion that the "equitable allocation approach" is an extremely burdensome, unworkable proposal.

D. The Special Master Correctly Concluded That The "Equitable Allocation Approach" Is Best Addressed To Congress

Adopting the "equitable allocation approach" (or the Special Master's unprecedented interpretation of the *Texas* rules) would violate the doctrine of *stare decisis*. *See* Exceptions of the State of New York to the Report of the Special Master at 73; Exceptions and Brief for the State of Delaware at 70-76. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved." *Payne v. Tennessee*, 111 S. Ct. 2597, 2610 (1991); *see also Planned Parenthood of Southeastern Pennsylvania v. Casey*,

---

[12] Although Michigan, *et al.*, discuss the "equitable allocation approach" only in the context of the distributions held by New York's record owners, it is apparent that their approach, and all of its administrative complexities, would apply as well to the property held by record owners and paying agents throughout the country.

60 U.S.L.W. 4795, 4801 (U.S. June 30, 1992) (Nos. 91-744 and 91-902). Moreover, the Special Master correctly concluded that Congress is better suited to carrying out exceptions to the *Texas* rules for particular types of transactions or property, as it did for money orders and travelers checks. Report at 54.

The argument of Michigan, *et al.*, that the adoption of the "equitable allocation approach" would not be inconsistent with the Court's original jurisdiction, or the judicial resolution of controversies in other contexts, is simply beside the point. *See* Michigan, *et al.*, Brief at 20-25 (citing, *e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), involving an equitable apportionment of water rights among three States). The "equitable allocation approach" radically departs from the Court's rules *already in place* for the resolution of disputes such as these, and would require vast changes in highly complex and settled commercial and state law practices affecting all financial institutions and States. These are "significant reasons to believe that Congress is better suited than the Court to weigh the merits of the equitable allocation approach." Report at 54.

Finally, were the Court to overcome all of the objections and adopt the "equitable allocation approach," it should only do so prospectively. The Court's past pronouncements on retroactivity would dictate this result. Not only is this a "sweeping new rule," thereby satisfying the first prong of *Chevron Oil v. Huson*, 404 U.S. 97 (1971), its complexities applied retroactively would create administrative havoc. Even the use of an artificial "single formula" to cover all prior funds, suggested by Michigan, *et al.*, would depend upon obtaining *past* statistics for each State's "commercial activities." Michigan, *et al.*, Brief at 29. Such a daunting task, made more so by its inexactness, coupled with the adverse effects that the resulting allocations would have on claimants' rights, clearly satisfies the Court's equitable concerns favoring the prospective operation of new legal principles. *Chevron Oil v. Huson*, 404 U.S. at 106-107.

CONCLUSION

The complaints in intervention of Michigan, *et al.*, should be dismissed because their "equitable allocation approach" requires a fundamental departure from *Texas v. New Jersey* and *Pennsylvania v. New York*. The Court should apply the *Texas* rules to the abandoned intangible property in this case, thereby rejecting the Special Master's Report and dismissing the complaints in intervention of Texas, *et al.*, and Alabama, *et al.*, and remand the matter for further proceedings before the Master concerning the factual issues raised by New York.

Dated: New York, New York
July 27, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

Supreme Court, U.S.
FILED
JUL 24 1992
OFFICE OF THE CLERK

No. 111 Original

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

REPLY BRIEF OF THE PLAINTIFF-INTERVENOR STATES OF TEXAS, ARIZONA, COLORADO, CONNECTICUT, IDAHO, MINNESOTA, NEW MEXICO, NORTH CAROLINA, OREGON, SOUTH CAROLINA, TENNESSEE AND WISCONSIN AND THE COMMONWEALTH OF VIRGINIA TO THE EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK

DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Deputy Attorney General
for Litigation, *Counsel of Record*
JAMES A. THOMASSEN
Assistant Attorney General
JEFFREY A. CORYELL
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711
(512) 463-2018

July 27, 1992

Attorneys For The State Of Texas

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

1. Introduction 1

2. The Rule of Texas v. New Jersey 3

3. The Unclaimed Property In This Case 6

SUMMARY OF ARGUMENT 12

ARGUMENT 14

I. THE ISSUERS ARE THE DEBTORS OF THE UNCLAIMED SECURITIES DISTRIBUTIONS IN THIS CASE UNDER THE RULE OF *TEXAS V. NEW JERSEY* 14

A. Delaware's Objections To The Special Master's Report Are Unfounded 15

1. Interpretation Of *Texas v. New Jersey* Is Not Controlled By Formalistic Notions Of The "Situs" Of Intangible Property Discussed In This Court's Prior Escheat Cases 16

2. The Federal Common Law Rule Of *Texas v. New Jersey* Must Conform To The Federal Purpose Of Fairness Among The States, Not A Rule Of State Law Governing Private Rights For Other Purposes 21

3. Recognizing Issuers As The Debtors Grounds The Equitable Rule Of *Texas v. New Jersey* In The Substance Of The Underlying Transaction, Not The Mere Shadow Play Of Street Name Registration 26

4. Delaware's Procedural Due Process And Stare Decisis Arguments Are Unfounded 33

B. New York's "Trading Addresses of Creditor Brokers" Theory Is Meritless 36

II. THIS COURT SHOULD IMPLEMENT THE SPECIAL MASTER'S RECOMMENDATION THAT THE LOCATION OF ISSUERS BE DETERMINED BY PRINCIPAL EXECUTIVE OFFICE RATHER THAN STATE OF INCORPORATION 43

A. Principal Executive Office Is Fairer Than State Of Incorporation As A Proxy For The Location Of Issuers 44

B. The Principal Executive Office Test Is Simple And Efficient To Implement 47

C. Modification Of The Backup Rule Is Not Barred By The Doctrine Of Stare Decisis 49

III. THE DECREE IN THIS CASE SHOULD APPLY TO ALL UNCLAIMED DISTRIBUTIONS WRONGFULLY TAKEN BY NEW YORK IN VIOLATION OF *TEXAS V. NEW JERSEY* 54

A. The Rulings By This Court In *Texas v. New Jersey* And *Pennsylvania v. New York* Establish That The Proposed Decree Should Apply To All Unclaimed Distributions Previously Taken By New York 55

B. Even If Standard Retroactivity Analysis Is Applied, The Ruling In This Case Should Be Fully Retroactive 58

C. New York May Not Avoid Its Obligation To Surrender The Unclaimed Property It Has Wrongfully Taken By Asserting The Equitable Doctrine Of Laches 64

CONCLUSION 66

TABLE OF AUTHORITIES

Cases: Page

American Trucking Ass'ns v. Smith, 496 U.S. 167 (1990) 59, 61
Anderson Nat'l Bank v. Luckett, 321 U.S. 233 (1944) 20
Ashland Oil v. Caryl, 110 S. Ct. 3202 (1990) 59
Baldwin v. Missouri, 281 U.S. 586 (1930) 18
Bangor Punta Operations v. Bangor & Aroostock Railroad Co., 417 U.S. 703 (1974) 26
Blodgett v. Silberman, 277 U.S. 1 (1928) 18
Boys Markets, Inc. v. Retail Clerk's Union, Local 770, 398 U.S. 235 (1970) 52
Burnet v. Harmel, 287 U.S. 103 (1932) 23
Calvary Holdings, Inc. v. Chandler, 948 F.2d 59 (1st Cir. 1991) 30
Chevron Oil v. Huson, 404 U.S. 97 (1971) 55, 57, 58-62
Colorado v. New Mexico, 459 U.S. 176 (1982) 22
Connecticut Mutual Life Ins. Co. v. Moore, 333 U.S. 541 (1948) 3, 17, 57
Connecticut v. Massachusetts, 282 U.S. 660 (1931) 22
Cruz v. Hauck, 762 F.2d 1230 (5th Cir. 1985) 65
Davis v. Fraser, 307 N.Y. 433, 121 N.E.2d 406 (1954) 27
Dimmit & Owens Financial, Inc. v. United States, 787 F.2d 1186 (7th Cir. 1986) 53

First National City Bank v. Banco Para El Commercio, 462 U.S. 611 (1983) 26
Funk v. United States, 290 U.S. 371 (1933) 35
Gamble-Skogmo, Inc. v. Saks, 35 Del. Ch. 503, 122 A.2d 120 (1956) 28
Gay v. Parpart, 106 U.S. 679 (1883) 26
Giroud v. United States, 328 U.S. 61 (1946) 52
In re Golf Course Builders Leasing, Inc., 768 F.2d 1167 (10th Cir. 1985) 53
Goodman v. Luken Steel, 482 U.S. 656 (1987) 61
Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938) 64
Gutierrez v. Waterman Steamship Co., 337 U.S. 206 (1963) 65
Helvering v. Hallock, 309 U.S. 106 (1940) 51
Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 22
Illinois v. Kentucky, 111 S. Ct. 1877 (1991) 64
Italo Petroleum Corp. v. Producers' Oil Corp., 20 Del. Ch. 283, 174 A.2d 276 (1934) 28
In re J.A. Thompson & Son, Inc., 665 F.2d 941 (9th Cir. 1982) 53
James B. Beam Distilling Co. v. Georgia, 111 S. Ct. 2439 (1991) 59
Karfunkel v. USLIFE Corp., 116 Misc. 2d 841, 455 N.Y.S.2d 937 (Sup. Ct. 1982), aff'd, 98 A.D. 628, 469 N.Y.S.2d 1020 (1st Dept. 1983) 27
Keech v. Zenith Radio Corp., 276 A.2d 270 (Del. Ch. 1971) 27

Merrill Lynch Pierce Fenner & Smith v. North European Oil Royalty Trust, 490 A.2d 558 (Del. 1985) 27
In re Metro Communications, Inc., 95 B.R. 921 (Bankr. W.D. Pa. 1989) 53
In re Metropolitan Royalty Corp., 62 A.2d 857 (Del. Super. Ct. 1948) 27
Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30 (1989) 23
New Jersey v. New York, 283 U.S. 336 (1931) 22
Northwest Airlines, Inc. v. Transport Workers Union, 451 U.S. 77 (1981) 22
Ohio v. Kentucky, 410 U.S. 641 (1973) 26
Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971) 33
Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977) 50
Payne v. Tennessee, 111 S. Ct. 2597 (1991) 49
Pearce v. Superior Court, 149 Cal. App. 3d 1058, 197 Cal. Rptr. 238 (5th Dist. 1983) 27
Pennsylvania v. New Jersey, 426 U.S. 660 (1976) 58
Pennsylvania v. New York, 407 U.S. 206 (1972) 5, 6, 35, 56
Rodriguez de Quijas v. Shearson/American Express, 490 U.S. 477 (1989) 60, 61
Safe Deposit & Trust Co. v. Virginia, 280 U.S. 83 (1929) 18
Security Savings Bank v. California, 263 U.S. 282 (1923) 4, 18, 20
Standard Oil Co. v. State of New Jersey, 341 U.S. 428 (1951) 3, 20, 32

State v. Amsted Industries,
48 N.J. 544, 226 A.2d 715 (1967) 33
Texas Industries v. Radcliff Materials,
451 U.S. 630 (1981) 22, 35
Texas v. New Jersey,
379 U.S. 674 (1965) ..... *passim*
Texas v. New Jersey,
381 U.S. 948 (1965) 56
Tracy v. Brentwood Village Corp.,
30 Del. Ch. 296, 59 A.2d 708 (1948) 28
Travelers Express Co. v. Cory,
664 F.2d 763 (9th Cir. 1981) 65
United States v. California,
332 U.S. 19 (1947) 64
United States v. Pelzer,
312 U.S. 399 (1941) 23
Western Union Telegraph Co. v. Pennsylvania,
368 U.S. 71 (1961) 4, 18, 57
Young v. Higbee Co.,
324 U.S. 204 (1945) 26

Federal Statutes:

12 U.S.C. § 2503(2) & (3) (1988) 51, 53
15 U.S.C. §§ 77a *et seq.* (1988 & Supp. II 1990) .. 47
15 U.S.C. § 77e (1988) 47
15 U.S.C. § 77f (1988) 47, 48
15 U.S.C. § 77g (1988) 47
15 U.S.C. § 77k (1988) 48
15 U.S.C. § 77x (1988) 48
15 U.S.C. § 78a *et seq.* (1988,
Supp. I 1989 & Supp. II 1990) 47
15 U.S.C. § 78*l* (1988, Supp. I 1989 &
Supp. II 1990) 29, 48
15 U.S.C. § 78m (1988 & Supp. II 1990) 30, 48
15 U.S.C. § 78o (1988 & Supp. II 1990) 9
15 U.S.C. § 78p (1988) 30

15 U.S.C. § 78q-1 (1988 & Supp. II 1990) 9, 28
15 U.S.C. § 78r (1988) 48
15 U.S.C. § 78ff (1988) 48
15 U.S.C. § 78aaa-78lll (1988) 9
25 U.S.C. §§ 1901-1963 (1988) 23
26 U.S.C. § 6323 (1988 & Supp. II 1990) 53
28 U.S.C. § 1332 (1988) 52
45 U.S.C. § 6 (1988) 54
45 U.S.C. § 34 (1988) 54
45 U.S.C. § 64(a)(1) (1988)..... 54
45 U.S.C. § 432(e) (1988) 54
45 U.S.C. § 436(a)(1) (1988) 54
45 U.S.C. § 438(c) (1988) 54
45 U.S.C. § 439(c) (1988) 54
49 U.S.C. § 26(h) (1988) 54

Disposition of Abandoned Money Orders and Traveler's Checks Act, Pub. L. No. 93-495, Title VI, 88 Stat. 1500, 1525 (1974) 51, 53

Federal Railroad Safety Authorization Act of 1980, Pub. L. 96-423, §§ 3, 5, 8, 9 & 12, 94 Stat. 1811, 1811-16 (1980) 54

Indian Child Welfare Act of 1978, Pub. L. No. 95-608, 92 Stat. 3069 (1978) 23

Securities Investor Protection Act of 1970, Pub. L. 91-598, 84 Stat. 1636 (1970) 9

Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (1933) 47, 48

§ 5 47
§ 6 ..... 47, 48
§ 7 47
§ 11 48

§ 24 48

Securities and Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 905 (1934) 9, 29, 30, 47, 48

§ 12 ..... 29, 48
§ 13 ..... 30, 48
§ 15 9
§ 16 30
§ 17A 28
§ 18 48
§ 32 48

Securities Acts Amendments of 1975, Pub. L. No. 94-29, § 15, 89 Stat. 97, 141-46 (1975) 9, 28

Federal Tax Lien Act of 1966, Pub. L. No. 89-719, Title I, § 101(a), 80 Stat. 1125, 1125-31 (1966) 53

Federal Regulations:

17 C.F.R. § 240.14a-1 (1992) 29
17 C.F.R. § 240.14a-13 (1992) 29
17 C.F.R. § 240.14b-1 (1992) 29
17 C.F.R. § 240.14b-2 (1992) 29
17 C.F.R. § 240.14c-1 (1992) 29
17 C.F.R. § 240.14c-7 (1992) 29

Federal Register:

56 Fed. Reg. 54,420 (1991) 49
51 Fed. Reg. 24,155 (1986) 49
47 Fed. Reg. 34,934 (1982) 48
47 Fed. Reg. 33,589 (1982) 48
47 Fed. Reg. 11,449 (1982) 48
46 Fed. Reg. 12,486 (1981) 48

42 Fed. Reg. 4,429 (1977) 48

SEC Forms:

Form 10 48
Form 10-C 48
Form 10-Q 48
Form 8-K 48
Form S-1 48

SEC No Action Letters:

Depository Trust Co., [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 82,192, at p. 82,243 (SEC No Action Letter, Feb. 23, 1979) 30

Legislative Materials:

H. Rep. No. 1025, 96th Cong., 2d Sess. (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3830 54

S. Rep. No. 1708, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3722 53

SEC Legislation, Hearings Before the Subcommittee on Securities of the Senate Committee on Banking and Securities, 85th Cong., 1st Sess. (1957) 8

SEC, Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities, House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976) 8

State Statutes:

Del. Code Ann. tit. 8, §§ 391 & 503 (1991) 46

N.Y. Aband. Prop. Law (McKinney 1991):

§ 103(c) 63
§ 300(1)(e) 37
§ 300(4) 63
§ 511(1) 37
§ 511(1-a) 37
§ 511(3) 37

Uniform Acts:

Model Business Corporations Act § 7.23 28

Uniform Commercial Code:

§ 8-207 24
§ 8-320(1) 9, 28
§ 8-406(1)(b) 28
§ 9-103(2) 52

Uniform Unclaimed Property Act of 1981 ..... 34, 35

§ 33 34

Law Review Articles:

Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 Del. J. Corp. L. 885 (1990) 47

Brudney, *Corporate Governance, Agency Costs and the Rhetoric of Contract*, 85 Col. L. Rev. 1403 (1985) 45

Chirrelstein, *Towards a Federal Fiduciary Standards Act*, 30 Clev. St. L. Rev. 203 (1981) 45
Hazen, *Corporate Directors' Accountability: The Race to the Bottom - The Second Lap*, 66 N.C. L. Rev. 171 (1987) 45
Macey & Miller, *Toward an Interest Group Theory of Delaware Corporation Law*, 65 Tex. L. Rev. 469, 472 (1987) 46
Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. Econ. & Org. 225 (1985) 46
Schwartz, *Federalism and Corporate Governance*, 45 Ohio St. L.J. 545 (1984) 45

Miscellaneous:

Black's Law Dictionary (West 5th ed. 1979) 52
DTC, *1989 Report of the Depository Trust Company* (1990) 9
DTC, *Shareholder Communications and the Depository Trust Company* (2d ed., undated) 15
Loss, *Securities Regulation* (1951) 8
New York Office of Unclaimed Funds, *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988) 37, 63
New York York Office of the State Comptroller, *Abandoned Property Law Handbook for Brokers and Dealers* (1983) 37
Stipulation of Agreed Facts, *In The Matter of the Application of the Office of the Comptroller For a Certification that Certain Property Held by Paine Webber Jackson & Curtis Be Deemed Abandoned Property* (Jan. 4, 1982) 37
Webster's Ninth New Collegiate Dictionary (Merriam-Webster 1989) 52

No. 111 Original

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

v.

STATE OF NEW YORK,

Defendant.

REPLY BRIEF OF THE PLAINTIFF-INTERVENOR STATES OF TEXAS, ARIZONA, COLORADO, CONNECTICUT, IDAHO, MINNESOTA, NEW MEXICO, NORTH CAROLINA, OREGON, SOUTH CAROLINA, TENNESSEE AND WISCONSIN AND THE COMMONWEALTH OF VIRGINIA TO THE EXCEPTIONS OF THE STATES OF DELAWARE AND NEW YORK

STATEMENT OF THE CASE

1. Introduction

This case involves a vast pool of unclaimed property, amounting to hundreds of millions of dollars, consisting of dividends and interest held (or previously held) by securities depositories, brokers and banks with operations in New York City. Much of this property has been seized by New York under its abandoned property laws, based on little more than the fortuitous location of Wall Street. Delaware commenced this litigation to assert that it should receive a major portion

of these funds, based solely on the happenstance that most of the brokers in question are incorporated in Delaware.

Texas intervened to urge that the federal common law rule of *Texas v. New Jersey*, 379 U.S. 674 (1965), properly applied to the facts of this case, should cause the unclaimed property to be distributed to all of the States, based upon the fact that the corporate and municipal issuers of the underlying securities (who paid out the dividends and interest that became unclaimed) are domiciled in such States. All of the remaining States and the District of Columbia have also sought leave to intervene, most in support of the Texas position.

The Special Master appointed by this Court has now filed his Report, which Texas and the other States joining in this Reply Brief ("Texas, *et al.*") support in all respects. The Special Master's conclusions reflect a detailed and careful analysis of the voluminous record and the contentions of all States participating in this case. His recognition that issuers are the debtors of securities distributions for purposes of the federal common law rule of *Texas v. New Jersey* will preserve that time-honored rule while applying it fairly to the factual setting of this case. In addition, the Special Master's recommended modification of the locational test under that rule, from state of incorporation to principal executive office, is an appropriate adjustment to preserve the rule's essential purpose of fairness among the States.

The objections of Delaware and New York to the Special Master's Report, on the other hand, would convert *Texas v. New Jersey's* rule of fairness into an engine of inequity. Delaware and New York each would bind the federal common law rule of that case to the technicality of nominee registration of securities, an arrangement created under state law for wholly unrelated purposes. New York further asserts that it is entitled to retain the enormous sums it has

wrongfully taken, based in part upon a newly-devised (and wholly invalid) presumption as to the identity of the unknown owners of unclaimed securities distributions held by brokers. None of the other forty-eight States or the District of Columbia has objected to the Special Master's Report.[1]

The contentions of Delaware and New York proceed from an erroneous view of both the conceptual underpinnings of *Texas v. New Jersey* and the purpose of the federal common law rule established therein. These two States further rely upon mistaken assertions about the nature of the unclaimed property in this case. A brief review of the history of the rule of *Texas v. New Jersey*, and of the nature of the unclaimed property at issue, is necessary before addressing the arguments advanced by Delaware and New York in their Exceptions to the Special Master's Report.

2. *The Rule of* Texas v. New Jersey

The occasion, although not the result, of the rule of *Texas v. New Jersey* was foreshadowed by a line of cases dealing with due process challenges to state escheat or unclaimed property laws. In these cases the various States' claims to escheat, based on different kinds of contacts between the escheating State and the escheated property, were upheld. *See, e.g., Standard Oil Co. v. State of New Jersey*, 341 U.S. 428, 437 (1951) (New Jersey was the state of incorporation of Standard Oil, the issuer and holder of the unclaimed property); *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 542 (1948) (New York was the state in which the underlying insurance policies had been issued for delivery,

---

[1] The States of Michigan, Maryland and Nebraska, and the District of Columbia, all endorse the Report of the Special Master, Exceptions of Michigan, *et al.*, 2, although they have filed Exceptions in order to continue to suggest that the unclaimed securities distributions should be spread among the States pursuant to an allocation formula specific to this case.

and in which the persons whose lives were insured by such policies had lived); *Security Savings Bank v. California*, 263 U.S. 282, 285 (1923) (California was the state in which contracts of deposit were made and to be performed, and in which the bank was incorporated and had its place of business). In *Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 72-79 (1961), the Court recognized that these possible premises for escheat of intangibles were conflicting, and indicated that it would be appropriate for the Court to establish a rule of priority to govern conflicting claims. However, as this Court later cautioned, "none of this Court's cases allowing States to escheat intangible property decided the possible effect of conflicting claims of other States." *Texas v. New Jersey*, 379 U.S. at 681 n. 13. In none of those cases was the issue of the priority of different States' laws squarely before the Court, and none of those cases now serves to limit or define the rule eventually adopted to establish such priority.

In *Texas v. New Jersey*, the priority issue was presented to the Court, which adopted the now well-known two-part rule of priority. The first, or "primary," rule provides that the power of escheat falls to the State of the last known address of the "creditor" of each item of property. 379 U.S. at 682. The Court explained that this rule is "require[d]" by "fairness among the States," because it: (1) "involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided;" (2) "recognizes that the debt was an asset of the creditor;" and (3) "will tend to distribute escheats among the States in the proportion of the commercial activities of their residents." 379 U.S. at 680-81.

Under the second, or "back-up," rule, however, when such "creditor" or address is unknown, or when such State has no applicable unclaimed property law, the unclaimed property is "subject to escheat by the State of corporate domicile" of the debtor, subject to the right of another State

to recover the property "upon proof that the last known address of the creditor was within its borders," or "if and when its law made provisions for escheat of such property." 379 U.S. at 682. Thus, under this back-up rule, a State "retain[s] the property for itself only until some other State comes forward with proof that it has a superior right to escheat." *Id.*

The unclaimed property at issue in *Texas v. New Jersey* included dividends on shares of common stock. In that case the debtor of these unclaimed securities distributions was held to be the issuing corporation, Sun Oil, despite the fact that some part of the unclaimed property in question was held not by Sun Oil but by various banks and paying agents. 379 U.S. at 675 n. 4. The unclaimed property in this case again includes dividends on corporate stock, as well as interest on corporate and government bonds. Texas, *et al.*, submit that, like the dividends at issue in *Texas v. New Jersey*, the unclaimed distributions in this case fundamentally represent payments of debts flowing from the issuers to the investors.

The rule of *Texas v. New Jersey* was revisited seven years later in *Pennsylvania v. New York*, 407 U.S. 206 (1972). The unclaimed property in the *Pennsylvania* case arose out of the purchase of money orders from Western Union. Pennsylvania argued that because Western Union's money order records frequently do not include an address for either the sender or the payee, the state in which the money orders were purchased should be presumed to be the State of the sender's residence and therefore entitled to take custody of the funds. 407 U.S. at 211-12. The Court declined to incorporate this presumption into the rule of *Texas v. New Jersey*. In response to the complaint that this would cause most of the funds to be remitted to the Western Union's state of incorporation, the Court noted that although the percentage of unknown addresses was apparently high, "a substantial number of creditors' addresses may in fact be available," and

nothing "prohibits States from requiring Western Union to keep adequate address records" in the future. 407 U.S. at 215.

Like the present case, the factual setting in *Pennsylvania v. New York* involved a multi-phase transaction. However, the transaction there was fundamentally different because the party originating the property (in that case, the sender of the money order) was unknown. In the present case, the issuer of the underlying security is always a known and locatable entity. Also, in the money order setting, the sender did not necessarily generate the money order in fulfillment of a debt. In the present case, whether the underlying security is a bond or a share of stock, the distribution is always transmitted by the corporate or municipal issuer in fulfillment of a contractual obligation undertaken by that issuer.

Texas, *et al.*, believe that the rule of *Texas v. New Jersey* has proven to be fair and practicable and has been applied to good effect to many kinds of unclaimed intangible property. Thus, these States submit that the rule should be preserved, and should be interpreted so as to produce a fair result when applied to the unclaimed securities distributions at issue in this case. The proposed modification of the back-up rule, which serves to refine and improve that rule in light of recent developments in law and technology, should be adopted.

3. The Unclaimed Property In This Case

The complexities of the securities industry, including the identity and role of various intermediaries involved in distributing dividends and interest from issuers of securities to their investors, and the various reasons that some of these payments become "stuck" in the hands of intermediaries rather than being passed on to the investors, are comprehensively described in Appendix B to the Special Master's Report. Texas, *et al.*, adopt the Special Master's

findings in lieu of a detailed recitation of facts in this Statement of the Case. In order to respond to certain assertions by Delaware and New York in their Exceptions, however, it is necessary to briefly highlight the following factual background.

While the fundamental economic relationship between the issuers of securities and their investors has not changed since *Texas v. New Jersey* was decided in 1965, the system for distributing dividends and interest from issuers to their investors has changed dramatically. Today securities are generally registered in nominee name and immobilized in a central depository. The depository holds the securities for the account of brokers and banks, whose books and records in turn show the holdings of their customers (or the holdings of other brokers or banks, who in turn hold those securities for their customers). Thus, securities distributions must pass through a chain of intermediaries such as depositories, brokers and banks before reaching the investors entitled to them.

The unclaimed property in this case comprises distributions whose progress from the issuer to the investor through the chain of intermediaries has been interrupted by processing delays, bookkeeping errors and other mishaps. In other words, the unclaimed property at issue is the amount by which the distributions received by the intermediaries exceed what the intermediaries must pay out to beneficial owners (or to other intermediaries to be further transmitted to beneficial owners) according to their own books and records, reduced by any amounts subsequently paid out by the intermediaries in response to valid claims of ownership. Although large in amount, these unclaimed distributions constitute only a minuscule portion of the billions of dollars of securities distributions that corporations and governments regularly transmit to intermediaries, with the intention and expectation that such distributions will be passed along to the

beneficial owners of the securities.

Distributions must be paid to intermediaries, rather than directly to the investors, because the securities are registered in the nominee names of the intermediaries.[2] Under a nominee arrangement, the investor retains ownership of and control over the securities, but does not appear as the record holder in the books of the issuer. This practice developed primarily to facilitate the settlement of securities trades, and the role of intermediaries in receiving and transmitting distributions is merely an "ancillary outgrowth" of nominee registration. Statement of the Depository Trust Company ("DTC") p. 2 (reproduced at Appendix ("App.") pp. 7a-8a).

Issuers have not always been required to transmit the bulk of the distributions on their securities through a chain of intermediaries. Until fairly recently, investors usually held physical security certificates registered in their own name.[3] However, in the late 1960s and early 1970s, the rapidly increasing volume of paper transactions processed through brokerage firms and transfer agents created a crisis in the industry. DTC Statement pp. 1-3 (App. pp. 7a-9a). This crisis led to the development of central depositories such as DTC, as well as a great increase in the percentage of

---

[2] For a discussion of nominee registration, *see* SEC, Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other Than the Name of the Beneficial Owner of Such Securities, House Committee on Interstate and Foreign Commerce, 94th Cong., 2d Sess. (1976).

[3] *See* Loss, *Securities Regulation* 529 n. 226 (1951) (only about 10% of corporate stock held in nominee name as of 1937); SEC Legislation, Hearings Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess. 34 (1957) (testimony of Philip A. Loomis, Jr., Director, Division of Trading and Exchanges, SEC) (about 20% of corporate stock held in nominee name by 1957).

securities held in nominee name.[4] A large majority of outstanding securities issues are now eligible for deposit into central depositories, and vast numbers of securities have actually been deposited. Brokers generally belong to the depositories and utilize their facilities. Shearer Dep. 362, 365; Principe Dep. 56-57; Cirrito Dep. 37.

Intermediaries such as brokers and banks are not entitled to retain the distributions they receive due to nominee registration. While the vast majority of such distributions are routinely passed along to investors, the unclaimed distributions in this case represent that tiny fraction of the total which inevitably goes awry in a complex system of such magnitude.[5] One of the brokers from whom discovery was taken estimated that "far, far less than one percent" of distributions handled by the brokerage firm become unclaimed property. Shearer Dep. 516.

Securities distributions are received by the intermediaries

---

[4] This evolution in the securities industry was spurred by a number of related developments. Congress passed the Securities Investor Protection Act of 1970, Pub. L. 91-598, 84 Stat. 1636 (1970) (codified at 15 U.S.C. §§ 78o, 78aaa-78lll (1988)), which permits investors to accept bookkeeping entries rather than physical certificates without risking the loss of their capital. The Uniform Commercial Code was amended to provide that legal delivery of a security occurs when an appropriate book entry has been made on the books of a depository. U.C.C. § 8-320(1) (promulgated in 1977) (App. pp. 4a-5a). Central depositories, initially created by the major exchanges, became subject to SEC regulation in 1975, and Congress specifically directed the SEC to encourage nominee registration. Pub. L. 94-29, 89 Stat. 141 (1975) (codified at 15 U.S.C. § 78q-1(e) (1988 & Supp. II 1990)).

[5] For example, in 1989 alone DTC processed $ 207.7 billion of cash dividend and interest payments. DTC, *1989 Report of the Depository Trust Company* 3 (Exhibit E to Brief of Ariz. [Tex.], *et al.* (Oct. 30, 1990)). Prudential Bache services over 300,000 different securities issues in over 2 million accounts. Cirrito Dep. 18-19.

from various sources including issuers, paying agents and depositories.[6] These payments are not identified to particular certificates within a security issue, but rather are received and held as one undifferentiated amount. Shearer Dep. 131. An intermediary discovers that it has received an overpayment only when the total amount it has received on a particular distribution for a particular security issue proves to be different from (and to exceed) the total amount that it has paid out to its customers or to other intermediaries. Principe Dep. 86; Shearer Dep. 181.

There are many acknowledged causes of unclaimed distributions, although as to particular items of property the specific cause (or causes) cannot be identified. Thus, for example, such unclaimed property may be caused by out-of-balance conditions between issuers and intermediaries;[7] "missed transfers" (i.e., when physical securities are sent to a transfer agent for reregistration, but the transfer agent fails to post the reregistration prior to the pertinent record date),[8] and various kinds of errors resulting in out-of-balance conditions between a depository and one of its participants, between brokers, or between brokers or banks and their

---

[6] DeCesare Dep. 26-27, 37-38; Cirrito Dep. 22, 40, 48, 71-78, 82-83; Principe Dep. 75, 79-80, 100-101, 104; Shearer Dep. 94, 129-35, 206-07, 225; Scott Dep. 15-16.

[7] DTC Statement p. 15 (App. pp. 11a-12a); Shearer Dep. 194; Cirrito 224; Scott Dep. 166-67.

[8] DeCesare Dep. 87-91, 120 ("it's always possible that [a transfer agent] could fail to post something on a transfer and have a bad record as to what is actually outstanding by registration") and 123 (missed transfers can result in excess payments to the depository that are still unresolved after three years and are therefore turned over to New York as unclaimed property); Principe Dep. 98; Shearer Dep. 242-43.

customers.[9] In the words of a vice president of Prudential Bache, "[t]here are any number of reasons why you would wind up receiving monies that you really wouldn't know what to do with." Cirrito Dep. 224.

Thus, the causes of this kind of unclaimed property are known to be numerous. However, by the time the unclaimed securities distributions become abandoned property (i.e, after the passage of the applicable dormancy period), both the actual owners of the property and the specific reasons that the property became unclaimed are not known. As explained by a senior vice president of Prudential Bache, "the problem with overages is that you don't have -- you don't agree or don't know to whom the monies are due. If you did, you would pay them." Cirrito Dep. 128.

Because nominee registration does not alter the economic rights of the beneficial owners of the securities, the intermediaries acknowledge that they do not own the unclaimed distributions. DTC Statement p. 18 (App. p. 14a) ("These funds and property do not belong to DTC"); DeCesare Dep. 36-37, 118-119, 131; Cirrito Dep. 73-75; Shearer Dep. 349, 352; Principe Dep. 104; Scott Dep. 157.

The intermediaries all account for unclaimed distributions on their own books and records by use of CUSIP numbers, or by internal codes that may be converted to CUSIP numbers. Cirrito Dep. 86, 90; Shearer Dep. 199, 203-04; Principe Dep. 91-92; Scott Dep. 176. CUSIP numbers uniquely identify the issuer as well as the particular issue of the underlying security. Thus, with respect to each and every item of unclaimed securities distributions in this case, the identity of the issuer is always a known factor.

---

[9] Shearer Dep. 194; Scott Dep. 166-67.

SUMMARY OF ARGUMENT

The Special Master correctly interpreted and applied the federal common law of interstate escheat priority to the factual setting in this case by recognizing that issuers rather than mere intermediaries are the debtors of unclaimed securities distributions for purposes of the rule of *Texas v. New Jersey*. This result grounds the federal common law in the fundamental economic relationship between issuers and their investors, not the mere shadow play of nominee ownership, an arrangement devised under state law merely to facilitate securities trading.

Contrary to Delaware's argument, the federal common law rule is not constricted by "substantive due process" considerations in the form of archaic notions of the "situs" of intangibles, nor is the federal common law controlled by technical state law definitions of "debtor." The essential federal purposes of fairness among the States and ease of administration require that the issuers of securities be recognized as the debtors under *Texas v. New Jersey*, without regard to whether the issuers are technically liable to their investors under state laws governing private rights for other purposes.

As an equitable rule, the rule of *Texas v. New Jersey* must be interpreted on the basis of the substance rather than the form of the underlying transaction. As state and federal laws recognize, nominee registration in the name of intermediaries is a matter of form, not determinative of substantive economic rights. The substance of the underlying transaction is that issuers generate securities distributions solely for the benefit of the beneficial owners of the securities. Distributions must pass through the hands of various intermediaries solely as the incidental result of the trading convenience of nominee registration. The priority of conflicting state escheat laws should not be determined by the

mere happenstance of which intermediary happens to be holding the distributions when they become "stuck."

Delaware's procedural due process and *stare decisis* objections to recognizing issuers as debtors are also flawed. The issue in this case is not which state has sufficient contacts with the unclaimed property to initiate unclaimed property proceedings in its own courts, but the very different issue of which State's law should have priority. The possibility that a State may be compelled to enforce its unclaimed property law in the courts of another State is inherent in the rule of *Texas v. New Jersey* and therefore constitutes no valid objection to the Special Master's proposed decree. The doctrine of *stare decisis* is not implicated by the Special Master's recognition of issuers as debtors because this is merely a logical interpretation of an existing judicial rule, not a reversal of, or departure from, prior precedent.

New York's newly created "trading address of creditor brokers" theory, by which it seeks to treat brokers differently than banks or DTC for purposes of *Texas v. New Jersey*, is meritless. This theory rests upon a series of presumptions, all of them unwarranted. In any event, New York's presumption-based theory is fatally inconsistent with *Texas v. New Jersey*.

The Special Master's recommendation that the locational test for issuers should be principal executive offices, rather than state of incorporation, should be adopted. The principal executive offices test is fairer than state of incorporation, and would be simple and efficient to implement due to the availability of SEC filings as an authoritative source for this information. This improvement of a judicially-created doctrine is neither barred by *stare decisis* nor inconsistent with judicial deference to the legislature.

The decree in this case should apply to all unclaimed property wrongfully taken by New York from securities intermediaries. New York's obligation to disgorge these funds is inherent in the nature of custodial taking of unclaimed property, and is compelled by this Court's disposition of the same issue in *Texas v. New Jersey* and *Pennsylvania v. New York*. Even if the retroactivity analysis set forth in *Chevron Oil v. Huson* is applied, moreover, that analysis confirms that New York must yield up the unclaimed property it has wrongfully taken.

ARGUMENT

POINT I.

THE ISSUERS ARE THE DEBTORS OF THE UNCLAIMED SECURITIES DISTRIBUTIONS IN THIS CASE UNDER THE RULE OF *TEXAS V. NEW JERSEY*

By recognizing issuers rather than mere intermediaries as the debtors of unclaimed securities distributions, the Special Master has correctly interpreted and applied the rule of *Texas v. New Jersey* in conformity with its essential federal purposes of fairness and clarity. As a rule of fairness, fashioned by this Court out of considerations of equity, the rule must take account of the economic reality of the underlying transaction and the fundamental relationships between the parties, not the mere technical status of intermediaries as nominee holders of securities.

The fundamental relationship out of which the unclaimed securities distributions arise is the relationship between the issuer of the security and its investors, who are the beneficial owners of the securities. It is undisputable that the system of nominee registration, with its attendant necessity of passing distributions along a chain of ownership from the issuer to

the investor, was created merely as a trading convenience. The issuer transmits distributions to intermediaries with the expectation that they will be passed along to the beneficial owners of the securities, and the intermediaries have no entitlement to retain the distributions. Thus, the intermediaries function merely as a conduit from issuer to investor, whose presence should be disregarded in applying a rule based on fairness and equity.[10]

Regardless of where securities distributions may get "stuck" along the chain of intermediaries between issuer and investor, the issuer retains its continuing status as the entity which issued the underlying security, caused the debt to the investor to come into being, and actually created the funds or property which has been inserted into the distribution system. Likewise, the beneficial owners retain their status as the parties with the exclusive right to the economic benefit of the distributions. It is the fundamental and continuing economic relationship between the issuer and its investors, not the mere happenstance that distributions may be received by an intermediary who is unable to further pass them along, that should guide the application of the rule of *Texas v. New Jersey*.

A. Delaware's Objections To The Special Master's Report Are Unfounded

The criticisms by Delaware of the Special Master's Report would wink away the economic reality of the unclaimed property, its nature and how it came into existence, in favor of a formalistic adherence to archaic

---

[10] This is entirely consistent with the intermediaries' own perception of their role as "preserv[ing]" their "transparency" in the chain of communication between issuers and beneficial owners. DeCesare Dep. Exh. 6 (DTC, *Shareholder Communications and the Depository Trust Company* 3, 6 (2d ed., undated) (cited at Report 24-25).

notions of the territorial "situs" of intangibles, and to a rule of state law governing the rights of private persons for other purposes.[11] As the Special Master correctly recognized, however, rules of state law do not control the federal common law rule expressed in *Texas v. New Jersey*, and must not be followed in this case. To do so would thwart the distinctly federal purposes of the rule of *Texas v. New Jersey* by exalting form over substance, elevating technicality over reality, and turning a rule premised upon fairness into a conundrum of inequity and internal contradictions.

1. Interpretation Of *Texas v. New Jersey* Is Not Controlled By Formalistic Notions Of The "Situs" Of Intangible Property Discussed In This Court's Prior Escheat Cases

Delaware argues that the rule of *Texas v. New Jersey* is limited by formalistic notions of the "situs" of intangibles discussed in this Court's prior escheat cases. Del. Br. 33-36. Thus, Delaware suggests that *Texas v. New Jersey* was the "culmination" of a line of cases "defining the limits of a state's power to escheat," Del. Br. 33, and that the Special Master's Report "goes beyond the traditional limits of substantive due process taught by those earlier decisions," Del. Br. 24. Specifically, Delaware argues that the primary rule of *Texas v. New Jersey* is defined by the notion that a State "step[s] into the creditor's shoes" (i.e., *mobilia sequuntur personam*), and likewise that the back-up rule is

---

[11] New York parrots Delaware's legal theory with respect to New York banks and DTC, since these entities are incorporated in New York. As to brokers, however, New York advances the different (and fatally inconsistent) theory that unclaimed distributions should be presumed "owed" to "creditor brokers" with "trading addresses" in New York. Delaware and New York's shared "intermediary debtors" theory is addressed jointly in this Section A of Point I. New York's further "creditor brokers" theory is separately addressed in Section B of Point I.

defined by the competing notion of "constructive dominion over the debt" based upon "power to seize funds from a person subject to its jurisdiction." Del. Br. 34. Delaware thus portrays the Report as raising "serious substantive due process concerns," Del. Br. 35, such that the term "debtor" must be equated with a state-law obligor rather than the known originator of the debt and the unclaimed property.

Delaware's reading of *Texas v. New Jersey* is untenable for at least three reasons. First, this Court's prior escheat cases did *not* define the "substantive due process" boundaries of a State's power to escheat, much less limit that power to two specific notions of the "situs" of an intangible. Second, Delaware's theory is contradicted by the reasoning of *Texas v. New Jersey*, which subordinated "substantive due process" considerations of "situs" to equitable considerations of fairness. Finally, the Court explicitly declared in *Texas v. New Jersey* that it had written a fundamentally new rule, on a clean slate, not controlled by Constitutional provisions or past precedents.

1. Nothing in the escheat cases preceding *Texas v. New Jersey* suggests that a State's power to escheat is constitutionally confined to the two notions of "situs" (*mobilia sequuntur personam* and the location of an obligor) that Delaware now contends define the permissible boundaries of the rule of *Texas v. New Jersey*. In the case upon which Delaware principally relies, *Connecticut Mutual Life Insurance Co. v. Moore*, 333 U.S. 541 (1948), the Court actually sustained a State's power to take custody of unclaimed proceeds on life insurance policies on the basis that (1) the policies were delivered within the State, and (2) the policies were issued on the lives of persons residing within the State. Thus, the contacts between the escheating state and the escheated property did not conform to either of the two notions of "situs" described by Delaware as "limiting" a State's power to escheat (i.e., in that case, the

location of the beneficiary of the policy or the domicile of the insurer), and yet the taking was upheld against the insurer's due process challenge. *See also Western Union Telephone Co. v. Pennsylvania*, 368 U.S. 71, 76 (1961) (noting that state claims to escheat the proceeds on unclaimed money orders could potentially be based on numerous contacts, including the residence of the payee, the location of the sender, the place where the money order was delivered, and the location of the fiscal agent on which the money orders were drawn); *Security Savings Bank v. California*, 263 U.S. 282, 285 (1923) (relevant contacts included principal place of business and place where contracts were made, as well as corporate domicile of debtor).

2. The reasoning employed by this Court in *Texas v. New Jersey* itself indicates most dramatically that traditional notions of the "situs" of intangibles as delimiting state escheat power in a substantive due process sense are alien to the rule adopted in that case. For example, the primary rule is in fact a significant deviation from the ancient doctrine of *mobilia sequuntur personam*. That doctrine, which had been followed (albeit with skepticism) in some Supreme Court cases but avoided in others,[12] traditionally requires that the creditor or his technical domicile be *actually* present within the State, not that the creditor merely have left behind a last known address. *Cf. Baldwin v. Missouri*, 281 U.S. 586, 592-93 (1930). By shifting the focus from technical domicile to last known address, *Texas v. New Jersey*, 379 U.S. at 681

---

[12] For example, the doctrine was adhered to in one succession tax case as "settled" law, "whether it approve itself to legal philosophic test or not." *Blodgett v. Silberman*, 277 U.S. 1, 10 (1928). However, in another succession tax case, *mobilia sequuntur personam* was characterized as a "legal fiction" and not followed. *Safe Deposit & Trust Co. v. Virginia*, 280 U.S. 83, 91-92 (1929). It is absurd to suggest that this embattled ancient doctrine commands such allegiance today as to "define" the "limits" of the primary rule under *Texas v. New Jersey*.

n.11, the Court detached the rule from the traditional due process notion of territorial dominion over the person. 379 U.S. at 678-79.[13] Hence, the primary rule may in a limited sense be "in line with" this ancient doctrine, 379 U.S. at 681, but it is also a significant departure from (and certainly not "controlled" by) that doctrine.

Similarly, in formulating the back-up rule, the Court revealed that it was concerned with considerations of fairness, not with the notion of "situs" as determined by the physical location of a state-law obligor. In evaluating Pennsylvania's proposed rule that the property should go to the State of the principal place of business of Sun Oil, the Court acknowledged that this claim was "in some respects ... more persuasive" because "this State is probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." 379 U.S. at 680. The characteristic of Sun Oil as owing the unclaimed property, however, was described by this Court as a factor counseling *against* use of a debtor-based rule to afford priority of taking, not a factor *in favor* of such priority. *Id.* (it would be "strange" to assign priority based upon a "liability"). Delaware's interpretation of the term "debtor" in the back-up rule thus focuses on the one attribute (merely having a liability) that this Court identified as rendering the use of the debtor's location *less acceptable*, and ignores the attribute (having created the unclaimed property) that gave the "principal place of business" test (and, inferentially, the other proposed proxy for the location of the corporation) its relative

---

[13] Justice Stewart highlighted this departure in his dissenting opinion by noting that "in a case such as this the domicile of the debtor is by hypothesis unknown," so that the rule may well "giv[e] the property to the one State within which we know the creditor is not." 379 U.S. at 683. Thus, the doctrine of *mobilia sequuntur personam* may have been a springboard for the primary rule, but the primary rule plainly moves far beyond it.

persuasiveness.

Significantly, the Court did not reject the "most significant contacts" test or the "place where the indebtedness was created" test (each proposed in *Texas v. New Jersey*, 379 U.S. at 677-78 & n. 6, 680) as insufficient to support a State's power to apply its unclaimed property laws in a "substantive due process" sense, even though these tests do not track the location of a creditor or of an obligor. Instead, the Court was concerned with whether these tests would provide a fair and clear rule of priority. Thus, the Court explained that the issue was not "whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts," but the "very different problem of deciding which State's claim to escheat is superior to all others," 379 U.S. at 678-79, a "question which should be determined primarily on principles of fairness," 379 U.S. at 680. Therefore, the reasoning employed in *Texas v. New Jersey* reveals that the conceptual underpinnings of the rule are not substantive due process notions of territorial "situs," but equitable considerations of fairness.[14]

---

[14] This conclusion is further compelled by the Court's statement that the proposed "corporate domicile" rule had "the obvious virtues of clarity and ease of administration," but would "too greatly exalt a minor factor" by "permit[ting] escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself." 379 U.S. at 679-81. In at least three prior opinions, the Court had endorsed corporate domicile as a permissible basis for escheating or taking custody of property. *Standard Oil Co. v. State of New Jersey*, 341 U.S. 428 (1951); *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233 (1944); *Security Savings Bank v. California*, 263 U.S. 282 (1923). None of these cases is even mentioned in the context of New Jersey's claim, despite the view of Justice Stewart that these precedents were effectively overruled by the Court's selection of creditor's last known address as the primary rule. 379 U.S. at 683 (dissenting opinion). Thus, it is clear that the rule announced in *Texas v. New Jersey* has no connection to the formalistic notions of the "situs" of intangibles that Delaware contends "defines" a state's power to escheat.

3. Finally, the Court in *Texas v. New Jersey* took care to explain, in plain terms, that it wrote upon a clean slate. The Court stated that its ruling "could have been resolved otherwise" because the issue of the priority of unclaimed property claims among States "is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic," but is "fundamentally a question of ease of administration and of equity." 379 U.S. at 683. The Court's choice was thus "require[d]" by "fairness among the States." 379 U.S. at 680. The rule ultimately adopted was thus not compelled by "substantive due process" notions of the "situs" of intangibles, but because it is "the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States." 379 U.S. at 683. Delaware's contention that the back-up rule of *Texas v. New Jersey* must be construed in conformity with the notion of the territorial "situs" of an intangible as following the location of a state-law obligor must therefore be rejected.

2. The Federal Common Law Rule Of *Texas v. New Jersey* Must Conform To The Federal Purpose Of Fairness Among The States, Not A Rule Of State Law Governing Private Rights For Other Purposes

Delaware contends that this Court must slavishly adhere to state law in fashioning the federal common law governing conflicting state claims to escheat of intangibles. Del. Br. 45-48. The Special Master correctly recognized, however, that the federal common law rule of *Texas v. New Jersey* is not controlled by rules of state law defining private rights and obligations. Report 25-26. Where state law is inconsistent with the federal purpose to be achieved by a rule of federal law, this Court has not hesitated to fashion federal law in accordance with that purpose. Here, the federal purposes of fairness among the States and clarity in defining the priority of State claims to escheat or custodial taking

require that the debtors of unclaimed securities distributions be the issuers of the securities, not the intermediaries who happen to end up holding such distributions when they become unclaimed.

Interstate controversies are recognized as one of the few areas of the law governed entirely by federal common law. *Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 & n. 33 (1981); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938). In such cases, "state law is not controlling." *Colorado v. New Mexico*, 459 U.S. 176, 184 (1982). This Court will draw upon settled principles of state law in fashioning federal common law only to the extent that such principles are *consistent* with the federal purpose to be achieved.

In *Connecticut v. Massachusetts*, 282 U.S. 660 (1931), for example, the Court refused to consider itself bound by the rule of riparian rights, even though that rule prevailed in each of the States before it:

> The determination of the relative rights of contending States ... does not depend upon the same considerations and is not governed by the same rules of law that are applied in such States for the solution of similar questions of private right.

282 U.S. at 670. *See also Colorado v. New Mexico*, 459 U.S. at 184-187 & n. 12; *New Jersey v. New York*, 283

U.S. 336, 342-343 (1931).[15]

In fashioning federal common law, this Court has not hesitated to depart from state law in order to further the uniquely federal purposes to be served. For example, in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30 (1989), this Court held that the word "domiciled" as used in the Indian Child Welfare Act of 1978, 25 U.S.C. §§1901-1963 (1988), is defined by federal common law rather than local state law. The Court then ruled that the children in the case were "domiciled" in a reservation as a matter of federal common law, even though the Supreme Court of Mississippi had found them not "domiciled" therein as a matter of state law. *See also United States v. Pelzer*, 312 U.S. 399, 402-03 (1941) (gifts held to be future interests for federal tax purposes despite treatment as present interests under state law); *Burnet v. Harmel*, 287 U.S. 103, 109-110 (1932) (state law treatment of oil and gas transaction as "sale" is immaterial in deciding whether "sale of corporate assets" occurs under federal tax law).

Contrary to Delaware's assertion, there is no lack of a federal reason for recognizing that issuers are debtors with respect to the unclaimed property at issue in this case. The overriding federal purposes to be served in this case are fairness among the states and clarity in operation of the rule of priority among the states. As discussed in the following subsection, equating mere intermediary holders with debtors under the rule of *Texas v. New Jersey* would produce only

---

[15] Delaware errs in arguing that the Court must follow state law in this case in order to avoid "disruption of the underlying state law." Del. Br. 45. The rule of *Texas v. New Jersey* is neither derived from state law defining property rights, nor does it have the effect of defining property rights under state law. The only effect of *Texas v. New Jersey*, and of the decree in this case, is to determine which State's unclaimed property law has priority over all others.

inequitable results and confusion in this area of the law.

Delaware argues that this Court should defer to a rule of state law providing an affirmative defense to issuers (i.e., U.C.C. § 8-207) on the ground that this rule is "uniform" among the States. Del. Br. 49. This argument misses the point. Whatever the universality or utility of this rule in the state-law context for which it was created (i.e., streamlining the processing of rights in securities by shielding issuers from the threat of multiple liability), the rule is simply inapplicable to the very different question of determining which State as a matter of fairness should have priority to escheat unclaimed securities distributions. Putting aside for the moment that fundamental error, however, Delaware's argument also fails for another reason. Regardless of how "uniform" § 8-207 may be among the various States, that uniformity is unavailing because § 8-207 does not uniformly apply to the unclaimed property in this case.

Section 8-207 provides that the issuer of a security may only "treat" the record holder as exclusively entitled to exercise the rights of ownership "prior to due presentment" of a certificated security for reregistration to a new record holder. U.C.C. § 8-207(1). This provision therefore does not apply to all of the unclaimed property at issue in this case, because some unknown portion of the unclaimed securities distributions at issue were paid by the issuers *after* "due presentment" of the underlying securities for reregistration, through errors or delays in reregistration ("missed transfers") on the part of the issuer or its paying agent.[16]

---

[16] "If, because of a delay in registration, DTC receives the payment instead of the new owner, DTC will experience an overpayment. ... Discrepancies in information received from the transfer agents could give rise to abandoned property." DTC Statement at 12 n. * (App. p. 11a n. 5).

(continued...)

Due to the nature of the unclaimed distributions at issue in this case, there can be no direct proof of the reason why any particular item of property became unclaimed. (If those facts were known, the item would be turned over to its rightful owner.) However, the record dramatically confirms that post-presentment distribution payments can become abandoned property. A document produced by New York in discovery shows that a transfer agent neglected to record the transfer of 100 shares of Borden, Inc. stock for fifteen years. This resulted in the payment of $ 3,500 in cash and 200 additional shares of stock to DTC, all after due presentment of the underlying 100 shares for reregistration, which DTC later remitted to New York. DeCesare Dep. 127-38 and Exhibit 6 (N.Y. Doc. N4949-4952). The quantity of funds and property that similarly have been paid out in error after presentment of securities for reregistration, and which lie undetected among the undifferentiated mass of unclaimed securities distributions held by intermediaries or by New York, cannot be told. What is apparent, however, is that § 8-207, even if it were pertinent to the issue in this case, does not uniformly apply to the unclaimed property in this case.

---

[16](...continued)

See also DeCesare Dep. at 87-91 (description of missed transfer as a cause of overages), 103-06 (missed transfers can occur in the direct mail withdrawal process), 119-20 (DTC cannot differentiate overages caused by Cede float from overages caused by undetected missed transfer). The brokers and custodial bank also confirmed that "missed transfers" cause overpayments of distributions to intermediaries. Shearer Dep. 194, 242-42; Principe Dep. 98; Cirrito Dep. 224; Scott Dep. 166-67, 169, 182-83 and Exhibit 9. The paying agent acknowledged that such erroneous post-presentment payments occur. Wellener Dep. 90-92, 124-25.

3. Recognizing Issuers As The Debtors Grounds The Equitable Rule Of *Texas v. New Jersey* In The Substance Of The Underlying Transaction, Not The Mere Shadow Play Of Street Name Registration

As a case in equity,[17] this proceeding is governed by the equitable principle that "[e]quity will penetrate beyond the covering of form and look at the substance of a transaction, and treat it as it really and in essence is, however it may seem." *Gay v. Parpart*, 106 U.S. 679, 699 (1883). *See First National City Bank v. Banco Para El Commercio*, 462 U.S. 611, 629-30 (1983) (Equity will disregard corporate entity to avoid fraud or injustice.); *Bangor Punta Operations v. Bangor & Aroostock Railroad Co.*, 417 U.S. 703, 713 (1974) (Courts of equity, "piercing all fictions and disguises," will deal with "substance" and not "blindly adhere" to form.); *Young v. Higbee Co.*, 324 U.S. 204, 209 (1945) ("Equity looks to the substance and not merely to the form.").

The present case must therefore be decided on the basis of the substance rather than the superficial appearance of the transactions involved. The essence of the distribution system is that the beneficial owners have invested their money in the issuers' securities and are exclusively entitled to receive the economic benefits of their investment, including distributions. Issuers generate distributions for the benefit of the beneficial owners, not of intermediaries. Distributions must pass through the hands of various intermediaries in the distribution system solely as an incidental result of the trading convenience of nominee registration. Issuers transmit distributions to the intermediaries solely for the purpose of

---

[17] "[P]roceedings under this Court's original jurisdiction are basically equitable in nature." *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973).

further transmitting the distributions to the beneficial owners.

Significantly, the courts have long recognized that the status of intermediaries as record holders is a mere matter of administrative convenience, which should not be taken to define substantive ownership rights. In *Keech v. Zenith Radio Corp.*, 276 A.2d 270 (Del. Ch. 1971), successors in interest to a brokerage firm sought to establish their entitlement to certain securities, the certificates for which had been lost, based upon the fact that the brokerage was the record holder. Due to the common practice of street name registration by brokers, the court ruled that there is no presumption of ownership arising out of record ownership by a broker. Although there was no notice to the issuer of any transfer of the shares by the broker, the mere fact of nominee registration in the name of a securities broker put the actual ownership of the securities in issue, and the persons claiming through the record holder were not entitled to claim the benefits of ownership without further proof of their entitlement. *See also Merrill Lynch Pierce Fenner & Smith v. North European Oil Royalty Trust*, 490 A.2d 558, 561 (Del. 1985); *Davis v. Fraser*, 307 N.Y. 433, 121 N.E.2d 406, 411-412 (1954); *In re Metropolitan Royalty Corp.*, 62 A.2d 857 (Del. Super. Ct. 1948). These cases explicitly recognize that the technical status of intermediaries as record holders is merely an administrative convenience, not reflective of the substantive ownership rights arising out of the securities.

Federal and state law both recognize the primacy of the economic relationship between issuers and their investors over the technicality of street name registration in matters of substantive right. Under state law, beneficial owners may bring stockholder's derivative actions in their own names, without regard to the nominee registration of the underlying securities. *Pearce v. Superior Court*, 149 Cal. App. 3d 1058, 197 Cal. Rptr. 238 (5th Dist. 1983); *Karfunkel v.*

USLIFE Corp., 116 Misc. 2d 841, 455 N.Y.S.2d 937 (Sup. Ct. 1982), *aff'd*, 98 A.D. 628, 469 N.Y.S.2d 1020 (1st Dept. 1983); *Gamble-Skogmo, Inc. v. Saks*, 35 Del. Ch. 503, 122 A.2d 120 (1956). Courts reviewing corporate elections may intervene to protect unregistered beneficial owners from fraud or injustice. *Tracy v. Brentwood Village Corp.*, 30 Del. Ch. 296, 59 A.2d 708, 709 (1948); *Italo Petroleum Corp. v. Producers' Oil Corp.*, 20 Del. Ch. 283, 174 A.2d 276, 278 (1934).[18]

Also recognizing the fundamental relationship between issuers and beneficial owners, book entry delivery of securities registered in the nominee name of a depository is deemed valid delivery of title to the beneficial owner. U.C.C. § 8-320(1) (App. pp. 4a-5a). Transfer agents and registrars owe a duty of good faith and due diligence to the beneficial owners of securities. U.C.C. § 8-406(1)(b) (App. p. 6a). Thus, the substantive rights of beneficial owners are not merely a matter of contract between them and their brokers or custodial banks, but are recognized and protected by state law.

Federal law likewise recognizes the fundamental economic relationship between issuers and beneficial owners. In 1975 Congress directed the Securities and Exchange Commission ("SEC") to develop a national depository system and to end the exchange of physical certificates among

---

[18] Many state corporation laws now permit corporations to adopt procedures to deal directly with the beneficial owners of their stock. *See* Model Business Corporations Act § 7.23. The significance of this is not, as Delaware asserts, Del. Br. 41-42, whether this provision has been utilized by a significant number of corporations. The significance for this case is that state law recognizes, as Delaware would have this Court ignore, that the fundamental investment relationship flows not between the issuer and the record owner on the one hand, or between the an intermediary and its customer on the other, but from the issuer to the beneficial owners who hold the economic rights to the underlying securities.

brokers. 15 U.S.C. § 78q-1(e) (1988) (enacted by Pub. L. 94-29, § 15, 89 Stat. 97, 141-46 (1975)). However, Congress also recognized that the consequent expansion of nominee registration could potentially affect the fundamental relationship between issuers and their investors. Therefore, Congress directed the SEC to:

> make a study and investigation of the practice of recording the ownership of securities in the records of the issuer in other than the name of the beneficial owner of such securities and to determine (1) whether such practice is consistent with the purposes of this chapter, ... and (2) whether steps can be taken to facilitate communications between issuers and the beneficial owners of their securities while at the same time retaining the benefits of such practice.

15 U.S.C. § 78*l*(m) (1988).

The SEC has promulgated a series of comprehensive regulations designed to facilitate interaction between issuers and their non-record beneficial owners. First, regulations require banks and brokers who hold securities on behalf of their customers to transmit to issuers upon request lists of beneficial owners who do not object to disclosure of their holdings. 17 C.F.R. §§ 240.14b-1 and 240.14b-2 (1992). This procedure facilitates communications between issuer and beneficial owner directly, without going through the intermediaries at all. Cirrito Dep. 52-55, 183-85. Second, the SEC has promulgated regulations that require intermediaries to transmit shareholder communications such as proxy solicitations promptly to beneficial owners. 17 C.F.R. §§ 240.14a-1, 240.14a-13, 240.14c-1 and 240.14c-7 (1992). The significance of these regulations is not whether they directly affect the payment of distributions; concededly, they do not. However, these regulations plainly recognize that in substance, the relevant economic relationship flows

from the issuer to its investors, not to the mere intermediaries reflected as nominee owners on the issuer's books and records.[19] In light of the recognition under state and federal law that the economic relationship, in substance, flows from the issuer to its beneficial owners, Texas, *et al.*, submit that the equitable rule of *Texas v. New Jersey* should be interpreted and applied to that relationship, not to the mere formality of nominee registration.

The analysis used by this Court in *Texas v. New Jersey* itself confirms that the substance rather than the form of the transaction should control. In adopting the primary rule, the Court looked to the fundamental nature of the unclaimed property as an asset of the creditor. The Court explicated this concept by noting that if the creditor, instead of perhaps leaving behind an uncashed check, had negotiated the check and left behind the cash, then the State in which the cash was physically located would have the only right to escheat. 379 U.S. at 681. Thus, in fashioning the rule, the Court was guided not by technical form of the transaction (e.g., whether the creditor had received a check), but instead by the equitable substance of the situation.

The application of the rule of *Texas v. New Jersey* recommended by the Special Master likewise responds to the equitable substance of the present multi-party transaction. Recognizing the issuer as the debtor takes account of the fact

---

[19] Disclosure requirements under the federal securities laws also show that the substantive economic relationship flows from issuers to beneficial owners, not to mere nominee holders. 15 U.S.C. §§ 78m(d) and 78p(a) (1988) (App. pp. 2a-4a) (reporting requirements for beneficial owners of 5% and 10% of certain classes of equity security). *See Calvary Holdings, Inc. v. Chandler*, 948 F.2d 59 (1st Cir. 1991) (mere nominee holder not required to file Schedule 13D); *Depository Trust Co.*, [1979 Transfer Binder] Fed. Sec. L. Rep. (CCH) para. 82,192, at p. 82,243 (SEC No Action Letter, Feb. 23, 1979)(depository-nominee exempt from reporting requirements).

that if the issuer, instead of transmitting the distribution to the wrong intermediary, had instead held on to the distribution pending a claim by the actual owner, then the issuer would be the entity holding and obliged to pay over the property as well as the entity that caused the property to come into existence. Thus, the equitable substance of the situation dictates that the state of the issuer should have the right to take custody of the intangible property at issue in this case.

Accepting the interpretation advanced by Delaware would affirmatively disrupt the federal purpose of fairness and clarity that this Court sought to achieve by adopting the rule of *Texas v. New Jersey*. First, if the location of a mere intermediary determines the State with priority to take custody of unclaimed securities distributions, vast amounts of unclaimed property would be turned over to one or two States on the basis of a party who neither has nor had any substantial or meaningful connection to the property, except that they have mistakenly received money owed to someone else.

Second, to the extent that the unclaimed distributions at issue represent proceeds of state and municipal obligations, it is patently unfair to adopt an interpretation that would cause those proceeds to inure to the benefit of a State other than the one whose taxpayers paid out the money. By recognizing the issuer as the debtor with respect to distributions on state and municipal obligations, this Court will insure that such distributions are returned to the State whose public expenditures caused the property to come into being, and whose taxpayers ought to be benefitted by the use and custody of any unclaimed property arising out of the underlying municipal obligations.

Third, the position argued by Delaware would cause paying agents to be treated differently than other

intermediaries when it comes to the escheat of owner-unknown securities distributions. Under the rule recommended by the Special Master, the mere business expediency of nominee registration is correctly deemed insignificant for determining priority to escheat, as are the business expediencies of paying agents and bank accounts. *Cf. Standard Oil Co. v. New Jersey*, 341 U.S. 428, 437 n. 8 (1951). Depositories, brokers and banks, like paying agents under present practice, would remit unclaimed property to the state in which the issuer is located.

Fourth, Delaware's interpretation would cause particular payments from the exact same distribution to be sent to different States depending solely upon which intermediary happened to be holding the distributions when they became unclaimed. This would require claimants of distributions that have been remitted to a State to unwind the often complicated trail of the distribution in order to determine where to claim the funds. Because distributions may pass through the hands of many intermediaries before they become "stuck", and because the transactions giving rise to the unclaimed distributions may involve multiple intermediaries, the unknown beneficial owner may have no knowledge regarding which intermediary was left holding his or her property. Thus, that beneficial owner would face the difficult, if not impossible, task of unwinding the transactions that precipitated the unclaimed distributions before he or she could know what State took custody of the funds. Under the Special Master's proposed decree, on the other hand, the investor could determine the state from which to claim distributions from the identity of the issuer of his security. The issuer is always a known quantity, no matter how many intermediaries may have come into contact with the unclaimed funds, and the identity of the issuer may always be ascertained from the CUSIP numbers that are universally employed to keep track of securities and distributions.

4. Delaware's Procedural Due Process And Stare Decisis Arguments Are Unfounded

Delaware contends that procedural due process concerns (i.e., that the state in which the issuer of securities is located may lack "minimum contacts" with the holder of the unclaimed distributions to initiate judicial proceedings in its own courts) counsel against adopting the Special Master's Report. Del. Br. 35.[20] This argument is without substance. The Special Master correctly rejected Delaware's procedural due process objection as a red-herring in this case. Report 68-70.

The possibility that a State with no continuing connection to the unclaimed property or its holder may have prior right to apply its unclaimed property laws is inherent in the primary rule under *Texas v. New Jersey*. The State in which the creditor's last known address is located (and in which the creditor herself may not be) may have no continuing connection at all to the unclaimed property or the holder thereof. This did not constitute any barrier to adoption of the primary rule, because the issue is which State's law has priority, not whether the State can sue in its own courts. Thus, the possibility that a State may be compelled to enforce its laws in the courts of another State (a practice which has been endorsed by the courts, *see, e.g., State v. Amsted*

---

[20] Delaware's citation to *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 500 (1971), to suggest that it is inappropriate for States to resort to the courts of sister States, Del. Br. 36, is misleading, to say the least. The quoted language is not a pronouncement by this Court, but merely part of a recitation of the policies supposed to underlie the grant of original jurisdiction under Article III of the Constitution. In fact, in the *Wyandotte* case, this Court declined to exercise its original jurisdiction, with the result that the plaintiff State may subsequently be compelled to enforce a judgment in the courts of a sister State. 401 U.S. at 499-500. Thus, *Wyandotte* is hardly authority for the proposition that States should never be exposed to the possibility of bringing suit in the courts of a sister State.

Industries, 48 N.J. 544, 226 A.2d 715, 718 (1967)), is inherent in the rule of *Texas v. New Jersey* already, and constitutes no barrier to recognizing the issuer as the debtor of unclaimed distributions on securities.

In any event, in many cases the intermediary holders of owner-unknown unclaimed securities distributions are national brokerage firms or other entities doing business in many States, so that minimum contacts for purposes of custodial taking will exist in the State entitled to take the property. For example, discovery taken in this case confirms that the brokerage firms Merrill Lynch and Prudential Bache have offices in all fifty States. Shearer Dep. 17; Cirrito Dep. Ex. 4. In those rare instances in which a State may find it necessary to enforce its unclaimed property laws against an intermediary not doing business within the State, any practical difficulties may be alleviated by interstate cooperative arrangements. *See* Unif. Unclaimed Prop. Act (1981) § 33, 8A U.L.A. 617, 672 (1983) (providing for interstate cooperation and agreements regarding unclaimed property claims).

Delaware also errs in arguing that the Special Master's recognition of issuers as debtors of unclaimed securities distributions under *Texas v. New Jersey* and *Pennsylvania v. New York* implicates the doctrine of stare decisis. Del. Br. 70-76. Neither of those cases addressed the different factual situation now before the Court. The present case involves only a judicial interpretation of the rule so that it may be equitably applied to a new factual situation.

It is perfectly appropriate and to be expected that this Court will develop and refine federal common law rules of its own making, especially in light of new factual situations not previously considered. "It has been said so often as to become axiomatic that the common law is not immutable but flexible and by its own principles adapts itself to varying

conditions." *Funk v. United States*, 290 U.S. 371, 383 (1933). To accept Delaware's conception of stare decisis would petrify the federal common law into a lifeless fossil, which surely it is not.

In this case, the Special Master has accomplished a clarification, not an "unacknowledged change," Del. Br. 28, 70, to the rule of *Texas v. New Jersey*. The conclusion that issuers are debtors of this property is merely a logical application of a federal common law rule in light of this Court's concerns for fairness and clarity as expressed in that decision. This part of the Special Master's Report therefore merely represents a judicial interpretation of the federal common law as applied to a new factual setting, not a reversal or amendment of the rule.

Contrary to Delaware's argument, the substance of the rule of *Texas v. New Jersey* is not defined or controlled by the Uniform Unclaimed Property Act or state unclaimed property laws. The rule of *Texas v. New Jersey* is a rule of *federal* common law. *Cf. Texas Industries v. Radcliff Materials*, 451 U.S. 630, 641 (1981) (original jurisdiction cases involving interstate controversies generate federal common law). To the extent that such state laws are inconsistent with this Court's interpretation of federal common law, they must yield to the latter under the Supremacy Clause. *Pennsylvania v. New York*, 407 U.S. at 215 n. 8. Thus, state laws such as these are simply irrelevant to the doctrine of stare decisis.[21]

---

[21] To the extent that the Uniform Unclaimed Property Act of 1981, and state laws fashioned after it, have conflated the terms "holder" and "debtor," this simply reflects that fact that the holder and the debtor are often the same. Texas, *et al.*, submit that such laws were not drafted in contemplation of the kind of multiparty, multiphase transaction now before this Court. As has occurred in the past, it is to be expected that the model unclaimed

(continued...)

B. New York's "Trading Addresses of Creditor Brokers" Theory Is Meritless

In addition to asserting that the intermediary brokers and banks who hold unclaimed securities distributions should be deemed the debtors of those distributions, an erroneous view that New York shares with Delaware, New York also contends that unclaimed distributions held by brokers (but not banks) are "owner-known" rather than "owner-unknown." Specifically, New York contends that these unclaimed distributions are in fact owed to other brokers or banks with "trading addresses" in New York, whose identities and "trading addresses" are identifiable through a meticulous reconstruction of the holding brokers' records. N.Y. Br. 77-81.[22] This contention is contradicted by: (1) the testimony of all three brokers from whom discovery was taken, who agree that their records do not identify the owners of the unclaimed property or their addresses, Shearer Dep. 193, 195, 198; Principe Dep. 104-05; Cirrito Dep. 73, 93-94; (2) New York's own litigation posture with respect to DTC and New York banks, as to whom New York concedes that the unclaimed securities distributions at issue in this case are owner-unknown, N.Y Br. 28, 81; and (3) New York's own prior statements, in litigation and official publications, that the books and records of brokers do not reveal the identity or last known addresses of the owners of this kind of unclaimed

---

[21](...continued)
property act will be amended as necessary to conform to this Court's statement of the federal common law in this area.

[22] New York concedes that the heroic effort that would be required to engage in this reconstruction renders it too costly for New York or the brokers themselves to actually perform on anything more than a random sample basis. N.Y. Br. 80.

property.[23]

New York's theory in this case is actually an after-the-fact rationalization for having taken millions of dollars of unclaimed distributions on the basis of statutes that have nothing to do with the rules of priority established in *Texas v. New Jersey*. The New York abandoned property law purports to cover all unclaimed distributions "received in this state" or "held in this state" by a broker or its nominee, without regard to whether or not the broker's records contain last known addresses of creditors. N.Y. Aband. Prop. Law §§ 511(1), 511(1-a) and 511(3) (McKinney 1991).[24] Thus, New York has in fact taken millions of dollars of unclaimed property from brokers doing business in New York, based on nothing more than the proximity of Wall Street.

New York's newly-minted "creditor broker" theory, invented in this litigation to justify its past conduct, rests upon a series of four presumptions, none of which is warranted as a matter of fact or relevant as a matter of law. These presumptions, and the reasons why they are unavailing, are as follows:

---

[23] Stipulation of Agreed Facts, *In The Matter of the Application of the Office of the Comptroller For a Certification that Certain Property Held by Paine Webber Jackson & Curtis Be Deemed Abandoned Property* para. 7 (Jan. 4, 1982) (App. p. 15a) (Exhibit 8 to Brief of Ala., *et al.* (Oct. 30, 1990)); New York Office of Unclaimed Funds, *Handbook for Reporters of Unclaimed Funds* 40 (2d ed. 1988) (App. pp. 16a-17a) (Exhibit 10 to Brief of Ala., *et al.* (Oct. 30, 1990)); New York Office of the State Comptroller, *Abandoned Property Law Handbook for Brokers and Dealers* para. 1 at p. 71, para. 4 at p. 73 (1983) (App. pp. 17a) (Exhibit C to Complaint of Delaware (Feb. 9, 1988)).

[24] Similarly, New York's statute applicable to banks covers unclaimed property "held or owing" by banking organizations, regardless of whether or not the holder's records contain last known address of creditors. N.Y. Aband. Prop. Law § 300(1)(e) (McKinney 1991).

1. New York presumes at the outset that all (or virtually all) of the unclaimed distributions held by brokers and eventually remitted to New York as abandoned property result from one single cause, "nominee float," which New York describes as "aris[ing] when brokers and banks buy and sell securities in certificated format and are unable to timely re-register the securities." N.Y. Br. 29-34, 77. In fact, as discussed *ante* at p. 10-11, unclaimed distributions may be attributable to variety of mishaps (e.g., delays, miscalculations, out-of-balance conditions) and transactions (e.g., fails-to-deliver, stock borrows) not involving "nominee float" at all.[25] Thus, there is no basis for New York's presumption that unclaimed distributions arise solely from nominee float.

Even if all unclaimed distributions could be attributed to "nominee float," which they cannot, not all "nominee float" can be attributed to deliveries of endorsed physical certificates to brokers or banks. Physical certificates may be endorsed and delivered directly to customers, in which case there is no broker or bank on the scene to play the part of a "creditor broker."[26]

New York disingenuously claims that brokers "attribute" their unclaimed distributions to "nominee float." N.Y. Br. 30 (citing Cirrito Dep. 128-29). In fact, while one of the

---

[25] DTC Statement pp. 12 n. *, 15 (App. pp. 11a-12a n. 5); DeCesare Dep. 87-91, 120-21, 123, 133, 138, and Exhibit 6; Shearer Dep. 131, 193-94, 242-43; Cirrito Dep. 75, 193-94; Principe Dep. 98.

[26] Direct deliveries of physical securities in endorsed physical form are common to institutional customers, who account for a large volume of business. Shearer Dep. 31-35; Principe Dep. 64; Cirrito Dep. 129, 212-13. Such deliveries are rare to retail customers, but do sometimes occur. Shearer Dep. 34; Cirrito Dep. 128-29; Affidavit of Edward Corman (Exhibit 6 to Brief of Aia., *et al.* (Oct. 30, 1990)).

brokers "guess[ed]" that nominee float is "probably the biggest cause" (or at least the "most clearly understood" cause) of unclaimed distributions, Cirrito Dep. 128, 224, all of the brokers agreed that "[t]here's many reasons why we could receive more money than we anticipated receiving," Shearer Dep. 192,[27] and all of the brokers further agreed that they cannot identify the actual reason (or reasons) for any specific unclaimed distribution that remains unclaimed, Shearer Dep. 192, 195; Principe Dep. 96, 101; Cirrito Dep. 223.

New York also attempts to shore up its presumption as to the cause of escheatable unclaimed distributions by asserting that brokers "routinely" pursue claims against overpayments resulting from causes other than "nominee float," thus negating those other causes as contributing to unclaimed distributions turned over to New York. N.Y. Br. 29, 33 n. 35. There is absolutely no support in logic or fact for this distinction. Brokers are just as likely, if not more, to pursue claims arising out of the "most clearly understood" phenomenon of nominee float than out of errors, out-of-balance conditions, failures to deliver, failures to credit customers' accounts, or other miscellaneous mishaps that may never come to the brokers' attention.[28]

---

[27] *See also* Cirrito Dep. 224 ("it could result from a number of different reasons") and Principe Dep. 97 ("any number of circumstances").

[28] New York produced representative claims, submitted by individuals to recover unclaimed distributions since remitted to New York as abandoned property, which confirm the variety of errors and mishaps that can result in escheatable unclaimed distributions. N.Y. Docs. N5016-27, N5404-26, N5427-37 (Exhibits 13-15 to Brief of Ala., *et al.* (Oct. 30, 1990)). As one of the brokerage officers said, "I caution you not to infer from [the industry practice of pursuing claims resulting from stock borrows] that everybody makes 100 percent of their claims on time and consequently everything is a wash, because in reality it doesn't happen that way." Cirrito Dep. 219.

2. New York's second presumption is that brokers' trade records, through an elaborate process of reconstruction, can generally yield up the specific delivery of a physical security certificate in endorsed negotiable form that later caused an overpayment of distributions to the broker. N.Y. Br. 80. Thus, as set out in the self-serving affidavit of New York's own Unclaimed Property Director, Robert Griffin (Exhibit A to New York Brief in Opposition to Filing of Complaint (May 9, 1988)), an unclaimed distribution in the amount of $ 1,100 on a dividend of $ 0.22 per share of Houghton Mifflin stock could be deduced to arise from a sale of 5,000 shares of such stock. The trade records of the broker could then be searched to find the prior trade of 5,000 shares of Houghton Mifflin that caused the overpayment.

Apart from the fact that overpayments do not necessarily result from deliveries of certificates to brokers or banks, New York's insistence that particular overpayments can be linked to particular trades is patently absurd. In the given hypothetical, the overpayment of $ 1,100 could represent the combination of two $ 550 overpayments, or the net result of an overpayment of $ 3,100 and an underpayment of $ 2,000. Even if the $ 1,100 amount represented only one overpayment caused by only one delivery, the so-called "creditor broker" could have engaged in hundreds (if not thousands) of prior trades of Houghton Mifflin stock. Any given trade of 5,000 shares, or two trades of 2,500, could be the cause, no matter how recent or how long ago.[29] The simple and indisputable fact is that nobody, broker or State auditor, can look at a brokers' trade records and, without additional information, link specific overpayments to specific trades. Shearer Dep. 192-93; Principe Dep. 102; Cirrito

---

[29] Of course, a physical certificate can remain outstanding in endorsed negotiable form for an indefinite time, resulting in overpayments on many successive distribution dates.

Dep. 73, 218-219, 222-24.

3. Even if all unclaimed distributions were caused by deliveries of certificates from brokers to other brokers or to banks (which they are not), and even if all overpayments could be linked to specific deliveries recorded in brokers' records (which they cannot), New York's "creditor broker" theory would nonetheless fail because of the specious nature of both parts of its third presumption: that all brokers or banks to whom physical certificates are delivered ("recipient brokers") both (a) *retain* the certificates in their possession until they are reregistered into the recipient brokers' names at some later date, and, until then, (b) *credit* their customers' accounts with the intervening periodic distributions that the brokers themselves fail to receive (because the underlying certificates are not registered in the recipient brokers' names).

First, recipient brokers do not necessarily retain physical certificates in endorsed negotiable form. They frequently endorse the certificates and pass them along. If purchased for an institutional customer, for example, the certificate is commonly endorsed and delivered to the customer. Shearer Dep. 33; Cirrito Dep. 36; Principe 64-65. In fact, deliveries to institutions or other brokers can be accomplished by sending along a certificate registered in any name at all, so long the necessary endorsements have been supplied. Principe Dep. 65 ("It could be any name ... If I have a certificate in the name of Merrill Lynch that's properly endorsed sitting in my box, I'll in fact deliver that certificate."); Shearer Dep. 33 ("It could be delivered in anybody's name").

Second, while it is an industry practice to credit customers' accounts on payment in general, this does not necessarily mean that the actual beneficial owners of unclaimed securities distributions were in each case credited

by their brokers. The portion of a distribution that may eventually become unclaimed property represents only a fraction of a percent of the entire distribution. Thus, this infinitesimal quantum that becomes "stuck" in the hands of an intermediary does not logically correspond to what "normally" or "usually" occurs. There is no basis to presume that just because customers' accounts are "usually" or "routinely" credited, the unknown beneficial owner corresponding to the unusual situation of an unclaimed distribution has in fact been paid that amount.

4. Finally, New York's theory also hinges on the unwarranted presumption that all of the so-called "creditor brokers" have "trading addresses" located in New York. New York admits, however, that not all, but only "almost all," N.Y. Br. 19, or "virtually all," N.Y. Br. 45, 80, of such "creditor brokers" are located in New York. As the Special Master concluded, Report 59 n. 50, there is no basis in logic or precedent for adopting a legal standard for presuming the addresses for a hypothetical class of creditors (or "virtually all" of such class) in lieu of actual last known addresses.

As shown above in detail, each of the four levels of presumptions upon which New York rests its claim in this litigation is unfounded. Moreover, as the Special Master correctly determined, New York's reliance upon "creditor brokers" is legally as well as factually insupportable. Report 61-68. New York's quest to prove that the addresses of recipient brokers and banks can be derived from the records of brokers holding unclaimed distributions is simply irrelevant, since such recipient brokers legally do not qualify as creditors or owners (or even "apparent owners") of the unclaimed property. When this Court referred to the last known addresses of creditors in *Texas v. New Jersey* and *Pennsylvania v. New York*, it referred to parties with some claim of ownership to the unclaimed property, not to mere

intermediaries. Thus, in *Texas v. New Jersey* the existence of paying agents and banks as holders of the unclaimed property was ignored, and in *Pennsylvania v. New York* the possibility that Western Union might pay the money orders through branch offices, banks or fiscal agents was not of concern. The essence of a "creditor" under the rule of *Texas v. New Jersey* is therefore that the unclaimed property is "property" or an "asset" as to the creditor. 379 U.S. at 680-681. There is nothing about the fact that a broker or bank at one time received the underlying security, without more, that establishes that such broker or bank is later entitled to receive distributions on the security. Thus, New York's factual contentions about identifying "creditor brokers" are legally irrelevant.

POINT II.

THIS COURT SHOULD IMPLEMENT THE SPECIAL MASTER'S RECOMMENDATION THAT THE LOCATION OF ISSUERS BE DETERMINED BY PRINCIPAL EXECUTIVE OFFICE RATHER THAN BY STATE OF INCORPORATION

In addition to recognizing issuers as the debtors of the unclaimed property in this case, a matter of judicial interpretation of the term "debtor" in the back-up rule of *Texas v. New Jersey*, the Special Master also recommends that this court implement a minor modification to a separate component of the back-up rule. Specifically, the Special Master recommends that the proxy for location of the issuer be changed from state of incorporation to principal executive office. Report 40-50. This recommendation does not discard but rather improves the back-up rule. Texas, *et al.*, endorse the Special Master's recommendation. Modifying the locational test as recommended produces a fair and easily implemented standard.

As the Special Master correctly noted, Report 41, in *Texas v. New Jersey* this Court recognized the manifest fairness of using a principal office or place of business test as a locator for purposes of applying the back-up rule, since that would send the property to a State "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." 379 U.S. at 680. However, perceiving determination of principal place of business to be "sometimes difficult," *id.*, the Court elected to use the ready surrogate of jurisdiction of incorporation as a location factor for purposes of applying the back-up rule.

The Special Master did not find (as Delaware suggests, Del. Br. 53) that this perception was "arbitrary" in 1965. Rather, the Special Master found that, however appropriate the Court's perception of relative convenience had been in 1965, changes in law and technology have now made clear that the principal executive office test is easy and simple to implement. Relative convenience having been equalized, manifest fairness tips the scales to principal executive office.

A. Principal Executive Office Is Fairer Than State Of Incorporation As A Proxy For The Location Of Issuers

As the Special Master correctly recognizes, Report 50, the principal executive office test is manifestly fairer than the state of incorporation test because it is much more likely to identify the jurisdiction which gave the benefits of its economy and laws to the company whose business activities made the intangible property come into existence, and also to distribute unclaimed property fairly among the States. Report 50.

As to the first criterion, it is indisputable that some, if not most, of the essential business activities of a company

will be carried out where a company has its principal executive office. Delaware's assertion that in some instances executive and manufacturing activities may occur in different places, Del. Br. 65-68, proves nothing to the contrary. At the very least, the principal executive office is the place where key business decisions are made. With respect to the vast majority of companies, moreover, much if not all of the company's other activities will also occur there or in the same state. Delaware's fanciful description of corporate executives relocating their offices to golf resorts notwithstanding, Del. Br. 67, the principal executive office test is an effective means to locate, in an precise and simple manner, the key business activities of a company.

On the other hand, there is no necessary connection at all between the business activities of a company and the State in which it happens to incorporate itself. Delaware nowhere disputes this. Instead, Delaware launches into an extensive, and entirely irrelevant, catalog of supposed benefits of Delaware corporation law to the stockholders of Delaware corporations. Del. Br. 62-64. This is an outright misreading of *Texas v. New Jersey*. The Court there identified the benefits a State gives to a company, not to its shareholders, as the relevant fairness criterion.[30]

---

[30] Even on its own terms, Delaware's argument is mistaken. Delaware says "penetrating academic analysis" and "comprehensive empirical study" have recently shown that Delaware corporation law provides benefits to shareholders of Delaware corporations, contradicting contrary views expressed "until about 20 years ago." Del. Br. 62-63. In fact, this academic debate continues to this day, with many eminent scholars opining that Delaware corporation law, through permissive measures, favors management to the *detriment* of shareholders. Hazen, *Corporate Directors' Accountability: The Race to the Bottom - The Second Lap*, 66 N.C. L. Rev. 171 (1987); Brudney, *Corporate Governance, Agency Costs and the Rhetoric of Contract*, 85 Col. L. Rev. 1403 (1985); Schwartz, *Federalism and Corporate Governance*, 45 Ohio St. L.J. 545 (1984); Chirrelstein,

(continued...)

Delaware also makes the erroneous argument that it would be fair to give the vast amounts of unclaimed property at issue in this case to Delaware because of the time and effort that its judiciary puts into deciding corporate law cases. Del. Br. 69. Even if there were any sense to the notion that Delaware deserves a reward for the efforts of its public sector, it already receives more than ample compensation from its steep corporation fees and franchise taxes, among the highest in the nation. Macey & Miller, *Toward An Interest Group Theory of Delaware Corporation Law*, 65 Tex. L. Rev. 469, 492 n. 86 (citing Del. Code Ann. tit. 8, §§ 391 and 503). Corporation franchise tax revenue averaged 15.8% of Delaware's total revenues during the period 1960 to 1980. Romano, *Law as a Product: Some Pieces of the Incorporation Puzzle*, 1 J. L. Econ. & Org. 225, 240-42 (1985). Plainly, any additional money coming Delaware's way as a result of the proliferation of Delaware corporations is sheer windfall.

Regarding the second criterion of fairness, distributing unclaimed property fairly among the States, nothing shows the superior fairness of principal place of business over state of incorporation better than the fact that over 50% of the

---

[30](...continued)
Towards a Federal Fiduciary Standards Act, 30 Clev. St. L. Rev. 203 (1981). Indeed, even the commentators upon which Delaware relies are not so uniformly laudatory as Delaware suggests. Professors Macey and Miller, for example, see Delaware corporation law as benefitting shareholders in some respects, but also as the "least restrictive ... in second-guessing the amount of manager's compensation, rejecting insider contracts on grounds of self-dealing, or permitting corporations to indemnify officers and directors," all favoring managers at the expense of shareholders, and further view Delaware's prominence as a state of incorporation in part as an effort to maximize revenues for "an elite cadre of Wilmington lawyers who practice corporation law" in Delaware. Macey & Miller, *Toward an Interest Group Theory of Delaware Corporation Law*, 65 Tex. L. Rev. 469, 472, 485 (1987).

Fortune 500 companies are incorporated in Delaware, but fewer than 1% of those companies have their headquarters there.[31] Delaware thus seeks to obtain an unconscionable windfall profit, fantastically out of proportion to the business activities that actually occur in Delaware, all based on the "minor factor" of where companies elected to incorporate themselves.

B. The Principal Executive Office Test Is Simple And Efficient To Implement

The principal executive office test would be simple and efficient to implement because the necessary data with respect to virtually all public issuers is contained in public filings with the SEC, and this information is publicly available though computerized databases.

Most private issuers of publicly traded securities are required to identify their principal executive office in filings with the SEC under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.* (1988 & Supp. II 1990) ("1933 Act"), and the Securities Exchange Act of 1934, 15 U.S.C. §§ 78a *et seq.* (1988, Supp. I 1989 & Supp. II 1990) ("1934 Act").[32]

---

[31] Del. Suppl. Br. 14 (Nov. 5, 1991) (citing Alva, *Delaware and the Market for Corporate Charters: History and Agency*, 15 Del. J. Corp. L. 885, 887-90 (1990)); Ala., *et al.* Suppl. Reply Br. 7 n. 6 (Nov. 21, 1991) (citing Disclosure Database and Standard & Poor's Corporate Descriptions).

[32] The 1933 Act requires the filing of a registration statement with the SEC with respect to non-government securities sold in interstate commerce. 1933 Act §§ 5 and 6, 15 U.S.C. §§ 77e and 77f (1988). Registration is accomplished by filing a comprehensive registration statement. 1933 Act § 7 and Schedule A, 15 U.S.C. § 77g and Schedule A (1988). The official SEC forms for the registration statement require that the "[a]ddress, including zip code, and telephone number, including area code, of registrant's principal executive office" be disclosed. *See, e.g.*, Form S-1,

(continued...)

These filings are well-suited to the back-up rule of *Texas v. New Jersey* because they are authoritative, regularly updated, and easily accessible to the public.

SEC filings are authoritative and regularly updated because the very purpose of such filings is complete and accurate disclosure, and because civil and criminal penalties are imposed for material misstatements contained therein.[33] Significantly, the 1934 Act itself invokes reliance upon the "principal executive office" disclosed by issuers.[34]

The data contained in SEC filings of issuers is widely available to the public through computerized data bases. *See, e.g., LEXIS-NEXIS Library Contents and Alphabetical List, Issue 1, 1991*, pp. 67-68 (Mead Data Central 1990); *Database List, Spring 1991*, p. 72 (West 1991). The SEC is

---

[32](...continued)
47 Fed. Reg. 11,449 (1982). The registration statement is available to the public, 1933 Act § 6(d), 15 U.S.C. § 77f(d) (1988).

The 1934 Act requires even more comprehensive filings by issuers of securities. Securities sold on national exchanges or quoted in the national over-the-counter market must be registered under the 1934 Act, and issuers of such securities must file periodic reports. 1934 Act §§ 12 and 13, 15 U.S.C. §§ 78*l* and 78m (1988, Supp. I 1989 & Supp. II 1990). The official forms promulgated by the SEC for these reports require disclosure of the issuer's "principal executive office." *See* Form 10, 47 Fed. Reg. 34,934 (1982) (registration of securities); Form 8-K, 42 Fed. Reg. 4,429 (1977) (current reports by issuers); Form 10-Q, 46 Fed. Reg. 12,486 (1981) (quarterly reports by issuers); and Form 10-C, 47 Fed. Reg. 33,589 (1982) (NASDAQ securities).

[33] 1933 Act §§ 11 and 24, 15 U.S.C. §§ 77k and 77x (1988); 1934 Act §§ 18 and 32, 15 U.S.C. §§ 78r and 78ff (1988).

[34] The 1934 Act requires persons acquiring more than 5% of any class of equity security to file with the SEC and send to the issuer "at its principal executive office" a statement containing specified information. 1934 Act § 13(d)(1), 15 U.S.C. § 78m(d)(1) (1988) (App. pp. 2a-3a).

planning a system called Electronic Data gathering Analysis and Retrieval System ("EDGAR") that will further facilitate electronic access. *See* 56 Fed. Reg. 54,420 (1991); 51 Fed. Reg. 24,155 (1986).

Delaware's complaint that the public databases reflect some conflicting headquarters data for a few companies is inapposite because those difficulties can generally be resolved short of litigation by referring to the original SEC filing. Those rare instances where companies report more than one principal executive office (apparently about as rare as companies with multiple incorporation) are so *de minimis* as to constitute no legitimate objection to the general utility of the rule.

C. Modification Of The Back-Up Rule Is Not Barred By The Doctrine Of Stare Decisis

Delaware errs in arguing that the minor change recommended by the Special Master is barred by the doctrine of stare decisis. That equitable doctrine has little force in the unique circumstances of this case because (1) the substantive rights of holders and claimants are not affected by the change, (2) all of the States potentially affected by this modification are presently before the Court, and (3) it would be inappropriate to defer to Congressional action with respect to a generally applicable change in the federal common law of interstate controversies created by this Court. Even if the doctrine of stare decisis had some force in this case, however, the minor modification here proposed is amply justified by changes in the law and in technology since 1965.

"*Stare decisis* is not an inexorable command; rather, it 'is a principle of policy and not a mechanistic formula of adherence to the latest decision.'" *Payne v. Tennessee*, 111 S. Ct. 2597, 2609-10 (1991) (quoting from *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)). In the present case, the

principles underlying the policy of stare decisis are largely inapplicable.

Contrary to Delaware's assertion, this case does not directly implicate the reliance interests of private persons with respect to property. The federal common law of interstate escheat claims does not determine *whether* private persons holding unclaimed property must remit such property to a State, but only *which* State has the prior claim to hold such property in custody. The holders, who have no ownership claim to the unclaimed property, do not have any property interest to be substantively affected by the federal common law, since they must turn the property over to one State or another in any event.

The only private persons with substantive rights regarding unclaimed property are the missing beneficial owners. As to them, however, it cannot be said that they relied upon a rule of priority among State unclaimed property laws. In any event, *Texas v. New Jersey* does not cut off their right to claim their property in the future, it only determines to which State such claims must be directed.

Therefore, the principal reliance interests that might be substantially affected by the proposed modification to the back-up rules belong to the States, not private persons.[35] In this unique litigation, moreover, all of the States are parties and therefore have a full and complete opportunity to bring before the Court any reliance interests at stake. Thus, the concern of stare decisis with the reliance interests of parties not before the Court is not implicated.

---

[35] As this Court has noted, in cases dealing not with "substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States," the "considerations of *stare decisis* play a less important role." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 382 (1977).

Delaware errs in arguing that this Court must defer to Congressional action to modify the locational test in a common law rule of this Court's creation. The Congress has not taken action in the interstate escheat priority area, except to make an adjustment in one limited form of transaction (money orders and travelers checks).[36] The proposed modification of the back-up rule locational test, on the other hand, while minor, is a change of general applicability. There is no basis to presume that Congress would take it upon itself to make a change of general applicability in an area addressed by this Court through its exclusive original jurisdiction of interstate controversies.

To the extent that Congress has taken action, of course, the change it effected is consistent with the change proposed by the Special Master.[37] The fact that Congress has not undertaken to enact this modification across the board, however, should not be taken as an endorsement of the present rule in other factual settings. As this Court has cautioned, the circumstances of Congressional silence must be "very persuasive" to bar this Court from "re-examining its own doctrines," since "[t]o explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities." *Helvering v. Hallock*, 309 U.S. 106, 119-20 (1940). Thus, "[i]t is treacherous at best to find in Congressional silence alone the adoption of a controlling

---

[36] None of the many federal statutes cited by Delaware as "displacing state authority to escheat," Del. Br. 71-72 & n. 85, purports to alter the rule of *Texas v. New Jersey*, or to impose a federal law of escheat of general applicability. These statutes address specific property in specific instances. Thus, they cannot fairly be construed as implying Congressional endorsement of the present locational test under the backup rule of *Texas v. New Jersey*.

[37] The secondary rule applied by Congress with respect to money orders and travelers checks relies upon the "principal place of business" of the issuer. 12 U.S.C. § 2503(2) & (3) (1988).

rule of law." *Boys Markets, Inc. v. Retail Clerk's Union, Local 770*, 398 U.S. 235, 241 (1970) (quoting *Giroud v. United States*, 328 U.S. 61, 69 (1946)).

Finally, even if the doctrine of stare decisis had any decisive effect in this litigation, Delaware is incorrect in suggesting that the modification suggested by the Special Master is not justified by changes occurring since 1965. As the Special Master correctly noted, the courts have now had substantial experience with "principal executive office" tests, and that experience has confirmed the certainty and reliability of this rule as compared to the "principal place of business" test used in 28 U.S.C. § 1332 (1988).[38]

The "chief executive office" standard was substituted for "chief place of business" as the locational test for debtors with respect to security interests in general intangibles under the Uniform Commercial Code in 1972.[39] *Compare* U.C.C. § 9-103(2) (1962) *with* U.C.C. § 9-103(3)(d) (1972). Courts applying the revised provision have consistently praised it as adding simplicity and precision to the law. For example, the

---

[38] Delaware discounts the significance of "principal executive office" tests in laws relating to perfection of liens because secured parties can file in multiple places. This argument misses the point. SEC filings by issuers of securities will relieve holders of unclaimed securities distributions of any significant doubt as to the location of an issuer's principal executive offices. The point of the use of "principal executive office" tests in lien laws is that legislators have passed these statutes, and courts have praised them, as an improvement over "principal place of business" and other imprecise tests. This experience is a change in the law that was not available to the Court when it decided *Texas v. New Jersey* in 1965.

[39] The phrases "chief executive office" and "principal executive office" are synonymous. Indeed, the words "chief" and "principal" are typically used to define each other. *Black's Law Dictionary* 216, 1073 (West 5th ed. 1979); *Webster's Ninth New Collegiate Dictionary* 232, 935 (Merriam-Webster 1989).

Ninth Circuit has hailed this revision in the following words:

> The subsequent revision of § 9[-]103 greatly assists in clearing up this confusion over the proper interpretation of 'place of management.'

In re J.A. Thompson & Son, Inc., 665 F.2d 941, 950 (9th Cir. 1982). *See also In re Metro Communications, Inc.*, 95 B.R. 921, 927 (Bankr. W.D. Pa. 1989) (citing *J.A. Thompson* and *Golf Course Builders* as placing "great weight" on change to "chief executive office"); *In re Golf Course Builders Leasing, Inc.*, 768 F.2d 1167, 1170 (10th Cir. 1985).

Similarly, "principal executive office" was adopted in 1966 as the locational test to determine where tax liens must be filed by the federal government. Pub. L. No. 89-719, Title I, § 101(a), 80 Stat. 1125, 1125-31 (1966) (amending 26 U.S.C. § 6323). The purpose of this terminology was to make the identification of the place for filing and searching for liens as "simple and certain as possible." *Dimmit & Owens Financial, Inc. v. United States*, 787 F.2d 1186, 1190-91 (7th Cir. 1986). The Senate report explains that "principal executive office" is "the most readily identifiable of all the offices that a business may maintain, appearing, as it does, on the annual reports filed with most States and on similar returns, and avoids the uncertainty of determining which of the many business offices that a taxpayer may maintain is its principal one." S. Rep. No. 1708, 89th Cong., 2d Sess. 11 (1966), *reprinted in* 1966 U.S. Code Cong. & Ad. News 3722, 3732.[40]

---

[40] The Congressional enactment relating to money orders and travellers checks, to the extent that it relies upon "principal place of business" to locate corporate issuers, is of course also a legal development that has occurred since 1965. 12 U.S.C. § 2503(2) & (3). Moreover, in addition to the

(continued...)

The change to principal executive office is also amply justified by the sweeping technological developments in the securities industry since 1965, including the changeover to depositories and nominee registration and the extensive use of computerized record-keeping (*ante* 6-8). It is now apparent that dividends on company stock are not escheated under the back-up rule "with comparative infrequency" as the *Texas v. New Jersey* Court predicted, 379 U.S. at 682, and that computer data systems have rendered the "principal executive office" test simple and efficient to implement.

POINT III.

THE DECREE IN THIS CASE SHOULD APPLY TO ALL UNCLAIMED DISTRIBUTIONS WRONGFULLY TAKEN BY NEW YORK IN VIOLATION OF *TEXAS V. NEW JERSEY*

The Special Master recommends that the proposed decree in this case should apply to all of the intangible property in issue that New York has taken in prior years under its overbroad abandoned property law. Report 70-77. Texas, *et al.*, submit that this result is compelled by the prior actions of New York, the nature of custodial taking itself, and this Court's prior rulings in *Texas v. New Jersey* and *Pennsylvania v. New York*. Even if this Court applies the

---

[40](...continued)
statutes cited above, a "principal executive office" standard was added in 1980 to the venue provisions governing eight causes of action relating to common carriers. Federal Railroad Safety Authorization Act of 1980, Pub. L. 96-423, §§ 3, 5, 8, 9 & 12, 94 Stat. 1811, 1811-16 (1980)(amending 45 U.S.C. §§ 6, 34, 64(a)(1), 432(e), 436(a)(1), 438(c) and 439(c), and 49 U.S.C. § 26(h)). Uniformity of application was obviously important to these amendments, which were intended "to allow the consolidation of related suits involving one carrier in one court." H. Rep. No. 1025, 96th Cong., 2d Sess. 15, *reprinted in* 1980 U.S. Code Cong. & Ad. News 3830, 3839-40.

retroactivity analysis set forth in *Chevron Oil v. Huson*, 404 U.S. 97 (1971), however, the conclusion that New York must yield up the property it has wrongfully taken is inevitable.[41]

A. The Rulings By This Court In *Texas v. New Jersey* and *Pennsylvania v. New York* Establish That The Proposed Decree Should Apply To All Unclaimed Distributions Previously Taken By New York

This Court recognized in *Texas v. New Jersey* that a State's custody of unclaimed property under the back-up rule is subject to a later claim by States which have or acquire a superior right to take custody of the unclaimed property. 379 U.S. at 682. Thus, the custodian State's right to possession is inherently subject to disgorgement in favor of either a State with a superior right to custody or, in the case

---

[41] Delaware also argues that the Special Master's proposed decree in this case should not be retroactively applied to property previously taken by Delaware. However, no claim has been asserted in this litigation against any property held by Delaware. Moreover, there is no indication whether Delaware has previously taken any unclaimed distributions on securities, or the circumstances under which Delaware may have taken custody of any property pursuant to the backup rule at all.

As will be demonstrated hereinafter, the Special Master correctly found that New York has no defense to disgorgement of the funds it has taken, principally because New York did not take the property in reasonable reliance upon either the primary or the backup rule of *Texas v. New Jersey*. With respect to Delaware, however, it may be that the equitable circumstances are not identical to those surrounding New York's past actions. If Delaware has taken unclaimed property under the backup rule from entities which were simultaneously both the issuer and the holder of the property, then Delaware (unlike New York) may have taken such property in reasonable reliance upon the "corporate domicile" locational test contained in the backup rule. This may provide Delaware with an equitable defense to disgorgement, not available to New York. Accordingly, Texas *et al.*, limit their response on the disgorgement issue to the property previously taken by New York.

of a custodial taking statute, to the missing owners when they come forward.[42]

Following this Court's decision in *Texas v. New Jersey*, the State of New Jersey moved this Court to impose a cut-off on the rights of other States to assert claims to intangibles it had previously taken. The Court denied New Jersey's motion. 381 U.S. 948 (1965). This disposition serves to further confirm that a State's right to take custody of unclaimed property under *Texas v. New Jersey* is inherently subject to divestment in favor of another State with a superior right.

Subsequently, in *Pennsylvania v. New York*, the State of New York contended that the rule announced in *Texas v. New Jersey* should be given only non-retroactive effect. Report of John F. Davis, Special Master, pp. 12, 14. Special Master Davis rejected this position, observing that it is "supported neither by argument nor reason." *Id.* at p. 21. Thus, he recommended that the Court's prior ruling "be applied to all the items involved in this case regardless of the date of the transactions out of which they arise." *Id.* This recommendation was adopted by this Court, 407 U.S. at 212-

---

[42] The custodial nature of a State's entitlement under the back-up rule, and under custodial taking statutes in general, serves to sharply distinguish this case from cases involving taxation. The retroactive application of a court decision determining a State's right to retain unclaimed property is not based on the same concerns as those informing the retroactive application of a court decision determining a State's power to tax. Unlike tax revenues, which a State receives as its own property and expends to provide essential services to its citizens, custodial unclaimed property is merely held in a State's possession as custodian. A State cannot legitimately contend that it relied on custodial unclaimed property in its planning and budgeting, or that it has expended the funds in reliance on a right to retain the funds permanently. Accordingly, the disgorgement of custodial unclaimed property cannot have the disastrous effect on a State and its citizens that could occur if a State were required to make massive refunds of tax revenues.

13, 215, despite the fact that New York had already taken part of the unclaimed funds at issue in the *Pennsylvania v. New York* litigation from Western Union. *See Western Union Telegraph Co. v. Pennsylvania*, 368 U.S. 71, 74 (1961) ("New York had already seized and escheated a part of the very funds here claimed by Pennsylvania").

Significantly, the Court in *Pennsylvania v. New York* did *not* engage in the retroactivity analysis for civil cases announced just one year before in *Chevron Oil v. Huson*, 404 U.S. 97 (1971). Delaware erroneously argues that this was because there was no rule of law in this area before *Texas v. New Jersey*, Del. Br. 78. This argument is incorrect, however, because the *Chevron* analysis is also triggered by decision of "an issue of first impression whose resolution was not clearly foreshadowed," 404 U.S. at 106, a description which fits *Texas v. New Jersey* perfectly. Instead, the reason that this Court did not engage in the *Chevron* retroactivity analysis in *Pennsylvania v. New York* is because retroactivity is implicit in the unique area of unclaimed property disputes between States.

Retroactivity is inherent in the very nature of custodial taking of unclaimed property. As this Court has recognized, States acquire unclaimed property under custodial taking statutes only as conservators for the missing owners. *Connecticut Mutual Life Ins. Co. v. Moore*, 333 U.S. 541, 547 (1948). All that New York acquires under its Abandoned Property Law, for example, is the right to hold unclaimed property until the missing owners appear. The possibility of eventually disgorging the unclaimed property therefore is inherent in the very nature of custodial taking.

Therefore, New York received the owner-unknown unclaimed distributions in this case solely as conservator, knowing that such distributions are subject to disgorgement in favor of unknown owners or of States with a superior

custodial right. It acquired no ultimate entitlement to the funds. If New York has spent the money, knowing the limited nature of its entitlement, it has only itself to blame for any burden entailed in disgorgement. "No State can be heard to complain about damage inflicted by its own hand." *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Accordingly, in light of the underlying purposes of this Court's rulings in the area of unclaimed property disputes between States, the question of retroactivity should be deemed foreclosed by the Court's summary disposition of that issue in *Pennsylvania v. New York*, without regard to the standard retroactivity analysis applied in other areas of the law.

B. Even If Standard Retroactivity Analysis Is Applied, The Ruling In This Case Should Be Fully Retroactive

In the event that this Court determines that it should consider in this case the retroactivity analysis applied in other areas of the law, that analysis dictates that the Court's ruling herein should be fully retroactive.

In *Chevron Oil v. Huson*, 404 U.S. 97, 105-107 (1971) this Court established a three-prong test for non-retroactivity. First, the rule to be applied non-retroactively "must establish a new principle of law," by "overruling clear past precedent" or by "deciding an issue of first impression whose resolution was not clearly foreshadowed." 404 U.S. at 106. Second, in light of the "prior history" and the "purpose and effect" of the rule, the Court should consider whether non-retroactivity would "further or retard its operation." *Id.* at 106-07. Finally, the Court should "weigh" the "inequity imposed by

retroactive application." *Id.* at 107.[43]

The first prong of the *Chevron Oil* analysis is not met when a decision merely "contribute[s] to the development" of the Court's jurisprudence in a given area, *Ashland Oil v. Caryl*, 110 S. Ct. 3202, 3205 (1990) (per curiam) (prior decision did not create new principle of law by extending Commerce Clause "internal inconsistency" test beyond original context). This standard is therefore not met by the Special Master's recognition of issuers of securities as debtors under *Texas v. New Jersey*.

The conclusion that the term "debtor" in *Texas v. New Jersey* was used in a descriptive sense, and that this description best fits the issuers of securities rather than mere intermediaries in the securities industry, was inherent in the Court's reasoning in *Texas v. New Jersey* and *Pennsylvania v. New York*. This aspect of the Report neither overrules those precedents nor decides a question of first impression whose resolution was not clearly foreshadowed. To the extent that the decree resolves a disputed issue concerning the application of the rule of *Texas v. New Jersey*, it is an issue as to which New York cannot claim reliance upon a "clear past precedent," *Chevron*, 404 U.S. at 106. Thus, this aspect of the proposed decree does not represent a "clear break from prior precedent," *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 184 (1990) (plurality opinion), and the

---

[43] The Court has reexamined the doctrinal underpinnings of retroactivity in two recent cases. *See James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990). While each case produced sharply divided opinions, neither *Beam* nor *American Trucking* forecloses the application of *Chevron Oil* in all cases. Assuming the continued viability of prospective adjudication and the appropriateness of a *Chevron Oil* analysis in the present case, such analysis clearly leads to retroactive relief in this case.

first prong of the *Chevron Oil* analysis is not met.[44]

The second prong of *Chevron Oil* also demands retroactive application of the proposed decree. This prong requires the Court to look at the "prior history" and "purpose and effect" of the rule, and to decide whether retroactivity will "further or retard its operation." Even if a decision concededly establishes a new principle of law, retroactive application is nonetheless required if it "furthers the purposes and effect" of the applicable law. *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 485 (1989) (decision that pre-dispute agreements to arbitrate claims under Securities Act are enforceable is retroactive despite reversal of clear precedent to contrary). Such is the case here.

The "prior history" of the rule includes this Court's rejection of arguments against disgorgement both in the denial of New Jersey's motion in *Texas v. New Jersey* and in the rejection of New York's non-retroactivity argument in *Pennsylvania v. New York*. The "purpose" of the rule is to distribute unclaimed property to those States with a logical and cogent connection to the property, and its "effect" is to confer only temporary custody over the unclaimed property pending disposition to the unknown owner or to a State with a superior right to custody. Retroactive application of the proposed decree will further this purpose and effect, by redistributing the unclaimed distributions from New York, which seized them without legal justification, to those States who in fairness should have custody of those distributions for

---

[44] The proposed minor adjustment of the locational test for the back-up rule, from state of incorporation to chief executive office, is a refinement rather than a reversal of the rule. However, to the extent that this minor change is deemed "new law" under the first prong of the *Chevron* analysis, the second and third prongs nevertheless dictate that the decree should be retroactive.

the benefit of their citizens. Thus, as this Court confirmed without hesitation in 1972, the rule should be applied retroactively.

New York misinterprets the second prong of *Chevron Oil* as hinging on whether retroactivity is required for deterrence effect. This is plainly incorrect, since the Court has often applied decisions retroactively where no deterrence effect was involved. *See, e.g., Rodriguez de Quijas v. Shearson/American*, 490 U.S. 477, 485 (enforceability of arbitration agreements held retroactive); *Goodman v. Luken Steel*, 482 U.S. 656, 662-64 (1987) (statute of limitations held retroactive). However, even if deterrence were the determinative issue, New York would lose. Unlike the state officials in *American Trucking Ass'ns v. Smith*, 496 U.S. 167 (1990), upon which New York relies, New York enacted and enforced its abandoned property with respect to the unclaimed distributions at issue in this case in contravention of established precedent.[45] Indeed, New York seized the distributions without the benefit of any genuine justification at all, other than the physical presence of various brokerage and bank operations in New York. It is difficult to imagine a more appropriate case for the deterrence effect of applying a decision retroactively. Otherwise, there will be no disincentive for States to grab unclaimed property in the future in contravention of existing precedent, confident that they will not be required at a later date to disgorge the funds. This is precisely the climate of uncertainty and expensive litigation between competing States that the Court in *Texas v. New Jersey* sought to avoid. 379 U.S. at 679.

Finally, the third prong of the *Chevron Oil* test also

---

[45] Of course, *American Trucking* is also plainly distinguishable because that decision involved taxes rather than unclaimed property. *See* footnote 41, *ante* at p. 56.

militates in favor of retroactivity. It would be unfair to deprive States with a logical and cogent connection to the unclaimed property at issue of their right to take custody thereof. It is not unfair to require disgorgement on the part of the State of New York, since it took custody of the unclaimed property only as conservator, subject to later relinquishment.

In any event, it is plain that New York did not rely upon *Texas v. New Jersey* in the sense contemplated by *Chevron Oil*, because the theories it advances were created after-the-fact for purposes of this litigation. New York did not in actuality rely upon those theories in seizing the property at issue. New York seized the unclaimed distributions in contravention of the rules of *Texas v. New Jersey*, not in reliance upon any interpretation (reasonable or otherwise) of those rules.

With respect to brokers, New York now claims that it took the unclaimed distributions on the ground that they are owed to "creditor brokers" with presumed "trading addresses" in New York. On its face, this theory is inconsistent with *Texas v. New Jersey*. Nowhere does that decision authorize the use of an invention such as "trading address," nor a presumption that any kind of last known addresses are generally within a particular State, nor the substitution of mere intermediaries for "creditors."[46]

With respect to custodian banks and DTC, it is equally

---

[46] Even if this theory were somehow derived from *Texas v. New Jersey*, moreover, the plain fact is that New York never really relied upon it. As discussed *ante* at 37, New York's statute regarding brokers does not conform to its own theory, much less *Texas v. New Jersey*, and New York's theory is also contradicted by New York's own prior statements, and a stipulation in a prior case, that brokers' records do not reveal the identity of, nor any last known addresses for, the owners of the property.

clear that New York did not rely upon *Texas v. New Jersey*. New York now asserts that it took unclaimed distributions from national banks on the ground that they have their "principal operations" in New York. N.Y. Br. 19 n. 21. This theory is not within the *Texas v. New Jersey* rule. 379 U.S. at 680 (declining to adopt "principal place of business" test). As to other banks and DTC (a limited purpose trust company chartered under New York banking law), New York now claims that it took unclaimed distributions on the ground that such banks are chartered in New York. New York's statute, however, is not limited to banks chartered in New York. N.Y. Aband. Prop. L. § 103(c) (McKinney 1991) ("banking organizations" defined to include banks "subject to" as well as "organized under" the laws of New York). In fact, New York's statute even applies to unclaimed distributions held by "the New York agency or agencies of all foreign banking corporations licensed to do business in [the State of New York]," regardless of their charter. N.Y. Aband. Prop. L. § 300(4) (McKinney 1991).[47] New York thus did not rely upon any interpretation of *Texas v. New Jersey*, reasonable or otherwise, in taking unclaimed distributions from either brokers or banks. Accordingly, even assuming that the *Chevron Oil* analysis is applicable to this case, the Court should conclude that retroactivity is required by the three-prong test announced in that case.

---

[47] New York's rationale as to banks is also contradicted by its unclaimed property handbook, which states that its abandoned property law does not apply to out-of-state branches of New York banks, but does apply to international banking facilities located in New York. New York Office of Unclaimed Funds, *Handbook for Reporters of Unclaimed Funds* 32 (2d ed. 1988) (App. p. 16a). Thus, the determinative factor in New York's actual practice is plainly the physical proximity of the branch holding the funds, not whether the bank is domiciled in New York.

C. New York May Not Avoid Its Obligation To Surrender The Unclaimed Property It Has Wrongfully Taken By Asserting The Equitable Doctrine Of Laches

Remaining to be considered is whether, given retroactive application of the rule of decision in this case, the State of New York should be permitted to retain millions of dollars that it has wrongfully taken from intermediaries in the securities industry on the basis of the equitable doctrine of laches. Texas, *et al.*, submit that it should not.

This Court has long held that the doctrine of laches is not applicable to governments in the exercise of their sovereign rights. *Illinois v. Kentucky*, 111 S. Ct. 1877, 1883 (1991); *Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132 (1938). As this Court stated in *United States v. California*, 332 U.S. 19, 40 (1947), "officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches or failure to act."

This rule should be applied to preclude the application of the doctrine of laches in this case. The millions of dollars of unclaimed securities distributions at issue here, when remitted to those States entitled to take custody of the funds, will inure to the benefit of all of the citizens of those States. As such the interests of the citizenry of all of the States involved in this litigation are at stake. The entitlement of States to enforce their custodial taking statutes for the benefit of their citizens should not be abridged by any alleged delay by State officials in asserting their citizens' rights in this case.

Even if the doctrine of laches were not absolutely precluded, however, it still could not be successfully asserted by the State of New York. It is well settled that laches

requires "prejudice to the other party," *Gutierrez v. Waterman Steamship Co.*, 337 U.S. 206, 215 (1963). Moreover, "prejudicial harm does not occur merely because one loses what he otherwise could have kept." *Cruz v. Hauck*, 762 F.2d 1230, 1238 (5th Cir. 1985). Rather, prejudice consists of "a disadvantage in asserting and establishing a claimed right or defense, or other damage caused by detrimental reliance." *Id.*

In this case New York has not suffered the kind of harm that triggers the doctrine of laches. The funds that New York received under its unclaimed property law were received only as custodian. New York cannot claim detrimental reliance because it received the funds knowing that it may be required to surrender them in the future.[48] Consequently, the equities in this case require that New York be ordered to disgorge the unclaimed property it has wrongfully taken.

CONCLUSION

The Special Master's Report presents an insightful and thorough, not to mention commercially practical, analysis of this Court's opinions in *Texas v. New Jersey* and *Pennsylvania v. New York*. Recognizing the issuers of securities as debtors of unclaimed securities distributions applies the back-up rule of *Texas v. New Jersey* fairly to the unclaimed property in this case, and the Special Master's proposed adjustment of the locational test for such issuers is a welcome enhancement of the rule. Texas, *et al.*,

---

[48] Indeed, it strains reason to convert New York's temporary possession of such funds, which it was never entitled to keep, from an undeserved windfall into a "detriment." *See Travelers Express Co. v. Cory*, 664 F.2d 763, 770 (9th Cir. 1981)(court finds no "reliance to detriment" on the part of holder who retained unclaimed funds it would otherwise have been required to surrender).

respectfully urge this Court to adopt the Report of the Special Master and to implement his Proposed Decree.

Respectfully Submitted,

DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Deputy Attorney General for Litigation, *Counsel of Record*
JAMES A. THOMASSEN
Assistant Attorney General
JEFFREY A. CORYELL
Assistant Attorney General
P. O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 463-2018

Attorneys for the State of Texas

[Counsel for Additional States Joining In This Brief Listed On Following Pages]

GRANT WOODS
Attorney General of Arizona
GAIL H. BOYD
Assistant Attorney General
Counsel of Record
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

GALE A. NORTON
Attorney General of Colorado
Counsel of Record
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
MAURICE KNAIZER
Assistant Attorney General
110 Sixteenth St., 10th Floor
Denver, Colorado 80202
(303) 620-4610

RICHARD BLUMENTHAL
Attorney General of Connecticut
WILLIAM J. PRENSKY
Assistant Attorney General
Counsel of Record
110 Sherman Street
Hartford, CT 06105
(203) 566-4899

LARRY ECHOHAWK
Attorney General of Idaho
THEODORE V. SPANGLER, Jr.
Deputy Attorney General
Counsel of Record
LAWRENCE G. SIRHALL, Jr.
Deputy Attorney General
P. O. Box 36
Boise, Idaho 83722
(208) 334-7530

HUBERT H. HUMPHREY, III
Attorney General of Minnesota
ALAN GILBERT
Assistant Attorney General
Counsel of Record
1100 Bremer Tower
Seventh Pl. & Minnesota Street
St. Paul, MN 55101
(612) 296-3546

TOM UDALL
Attorney General of New Mexico
GURU TERATH SINGH KHALSA
Assistant Attorney General
Counsel of Record
P. O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6083

LACY H. THORNBURG
Attorney General of North Carolina
ANDREW A. VANORE, Jr.
Chief Deputy Attorney General
M. ANN REED
Senior Deputy Attorney General
DOUGLAS A. JOHNSTON
Assistant Attorney General
Counsel of Record
P. O. Box 629
Raleigh, NC 27602
(919) 733-3064

CHARLES S. CROOKHAM
Attorney General of Oregon
JACK L. LANDAU
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
Counsel of Record
DONALD C. ARNOLD
Chief Counsel
General Counsel Division
WILLIAM R. COOK
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310
(503) 378-4402

T. TRAVIS MEDLOCK
Attorney General of South Carolina
RAY N. STEVENS
Chief Deputy Attorney General
RONALD W. URBAN
Deputy Attorney General
Counsel of Record
P. O. Box 125
Columbia, SC 29214
(803) 737-4430

CHARLES W. BURSON
Attorney General & Reporter of Tennessee
MICHAEL W. CATALANO
Deputy Attorney General
Counsel of Record
450 James Robertson Parkway
Nashville, TN 37219-5025
(615) 741-3499

JAMES E. DOYLE
Attorney General of Wisconsin
BURNEATTA BRIDGE
Assistant Attorney General
Counsel of Record
P. O. Box 7857
Madison, WI 53707-7857
(608) 266-3067

MARY SUE TERRY
Attorney General of Virginia
STEPHEN D. ROSENTHAL
Chief Deputy Attorney General
GAIL STARLING MARSHALL
Deputy Attorney General
MARY YANCEY SPENCER
Deputy Attorney General
E. SUZANNE DARLING
Assistant Attorney General
Counsel of Record
101 North Eighth Street
Richmond, Virginia 23219
(804) 225-4486

APPENDIX

APPENDIX

Table of Contents

FEDERAL STATUTES Page

§ 13(d)(1) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78m(d)(1) (1988) 2a

§ 16(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78p(a) (1988) 4a

UNIFORM ACTS

Uniform Commercial Code § 8-320 ..... 4a

Uniform Commercial Code § 8-406 ..... 6a

MISCELLANEOUS [RELEVANT EXCERPTS]

Statement of the Depository Trust Company 7a

Stipulation of Agreed Facts, *In The Matter of the Application of the Office of the Comptroller For a Certification that Certain Property Held by Paine Webber Jackson & Curtis Be Deemed Abandoned Property* (Jan. 4, 1982) 15a

New York Office of Unclaimed Funds, *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988) 16a

New York Office of the State Comptroller, *Abandoned Property Law Handbook for Brokers and Dealers* (1983) 17a

§ 13(d)(1) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78m(d)(1):

(d) Reports by persons acquiring more than five per centum of certain classes of securities

(1) Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is registered pursuant to section 78*l* of this title, or any security of an insurance company which would have been required to be so registered except for the exception contained in section 78*l*(g)(2)(G) of this title, or any equity security issued by a closed-end investment company registered under the Investment Company Act of 1940 [15 U.S.C. § 80a-1 *et seq.*] or any equity security issued by a Native Corporation pursuant to section 1629(d)(6) of Title 43, is directly or indirectly the beneficial owner of more than 5 per centum of such class shall, within ten days after such acquisition, send to the issuer of the security at its principal executive office, by registered or certified mail, send to each exchange where the security is traded, and file with the Commission, a statement containing such of the following information, and such additional information, as the Commission may by rules and regulations, prescribe as necessary or appropriate in the public interest or for the protection of investors--

(A) the background, and identity, residence, and citizenship of, and the nature of such beneficial ownership by, such person and all other persons by whom or on whose behalf the purchases have been or are to be effected;

(B) the source and amount of the funds or other consideration used or to be used in making the purchases, and if any part of the purchase price is represented or is to be represented by funds or other consideration borrowed or otherwise obtained for the purpose of acquiring, holding, or

trading such security, a description of the transaction and the names of the parties thereto, except that where a source of funds is a loan made in the ordinary course of business by a bank, as defined in section 78c(a)(6) of this title, if the person filing such statement so requests, the name of the bank shall not be made available to the public;

(C) if the purpose of the purchases or prospective purchases is to acquire control of the business of the issuer of the securities, any plans or proposals which such persons may have to liquidate such issuer, to sell its assets to or merge it with any other persons, or to make any other major change in its business or corporation structure;

(D) the number of shares of such security which are beneficially owned, and the number of shares concerning which there is a right to acquire, directly or indirectly, by (i) such person, and (ii) by each associate of such person, giving the background, identity, residence, and citizenship of each such associate; and

(E) information as to any contracts, arrangements, or understandings with any person with respect to any securities of the issuer, including but not limited to transfer of any of the securities, joint ventures, loan or option arrangements, puts or calls, guaranties of loans, guaranties against loss or guaranties of profits, division of losses or profits, or the giving or withholding of proxies, naming the persons with whom such contracts, arrangements, or understandings have been entered into, and giving the details thereof.

§ 16(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78p(a):

(a) Filing of statement of all ownership of securities of issuer by owner of more than ten per centum of any class of security

(a) Every person who is directly or indirectly the beneficial owner of more than 10 per centum of any class of any equity security (other than an exempted security) which is registered pursuant to section 78*l* of this title, or who is a director or an officer of the issuer of such security, shall file, at the time of the registration of such security on a national securities exchange or by the effective date of a registration statement filed pursuant to section 78*l*(g) of this title, or within ten days after he becomes such beneficial owner, director or officer, a statement with the Commission (and, if such security is registered on a national securities exchange, also with the exchange) of the amount of all equity securities of such issuer of which he is the beneficial owner, and within ten days after the close of each calendar month thereafter, if there has been a change in such ownership during such month, shall file with the Commission (and if such security is registered on a national securities exchange, shall also file with the exchange), a statement indicating his ownership at the close of the calendar month and such changes in his ownership as have occurred during such calendar month.

Uniform Commercial Code § 8-320:

Transfer or Pledge Within Central Depository System

(1) In addition to other methods, a transfer, pledge, or release of a security or any interest therein may be effected by the making of appropriate entries on the books of a clearing corporation reducing the account of the transferor, pledgor, or pledgee and increasing the account of the

transferee, pledgee, or pledgor by the amount of the obligation or the number of shares or rights transferred, pledged, or released, if the security is shown on the account of a transferor, pledgor, or pledgee on the books of the clearing corporation; is subject to the control of the clearing corporation; and

(a) if certificated:

(i) is in the custody of the clearing corporation, another clearing corporation, a custodian bank, or a nominee of any of them; and

(ii) is in bearer form or indorsed in blank by an appropriate person or registered in the name of the clearing corporation, a custodian bank, or a nominee of any of them; or

(b) if uncertificated, is registered in the name of the clearing corporation, another clearing corporation, a custodian bank, or a nominee of any of them.

(2) Under this section entries may be made with respect to like securities or interests therein as a part of a fungible bulk and may refer merely to a quantity of a particular security without reference to the name of the registered owner, certificate or bond number, or the like, and, in appropriate cases, may be on a net basis taking into account other transfers, pledges, or releases of the same security.

(3) A transfer under this section is effective (Section 8-313) and the purchaser acquires the rights of the transferor (Section 8-301). A pledge or release under this section is the transfer of a limited interest. If a pledge or the creation of a security interest is intended, the security interest is perfected at the time when both value is given by the pledgee and the appropriate entries are made (Section 8-321). A

transferee or pledgee under this section may be a bona fide purchaser (Section 8-302).

(4) A transfer or pledge under this section is not a registration of transfer under Part 4.

(5) That entries made on the books of the clearing corporation as provided in Section (1) are not appropriate does not affect the validity or effect of the entries or the liabilities or obligations of the clearing corporation to any person adversely affected thereby.

Uniform Commercial Code § 8-406:

Duty of Authenticating Trustee, Transfer Agent, or Registrar

(1) If a person acts as authenticating trustee, transfer agent, registrar, or other agent for an issuer in the registration of transfers of its certificated securities or in the registration or transfers, pledges, and releases of its uncertificated securities, in the issue of new securities, or in the cancellation of surrendered securities:

(a) he is under a duty to the issuer to exercise good faith and due diligence in performing his functions; and

(b) with regard to the particular functions he performs, he has the same obligation to the holder or owner of a certificated security or to the owner or pledgee of an uncertificated security and has the same rights and privileges as the issuer has in regard to those functions.

(2) Notice to an authenticating trustee, transfer agent, registrar, or other agent is notice to the issuer with resect to the functions performed by the agent.

Statement of the Depository Trust Company:

* * *

[p. 1] **CREATION OF DTC BY ITS PARTICIPANTS**

The Depository Trust Company ("DTC") is a limited purpose trust company which was incorporated under the New York Banking Law in 1973. In addition, DTC is a member of the Federal Reserve System, a "clearing corporation" within the meaning of Article 8 of the Uniform Commercial Code (which authorizes book entry transactions)[1] and a "clearing agency" registered pursuant to the provisions of Section 17A of the Securities Exchange Act of 1934, as amended.[2] In order to fully understand DTC's role in the national system of clearance and settlement, it is helpful to consider how and why DTC came into existence.

DTC was born out of the securities industry's paperwork crisis in the late 1960's, when processing problems caused a major disruption in the financial industry. At that time, settlement of securities trades was accomplished by physical deliveries of certificates vs. payment.

[p. 2] In 1968, the New York Stock Exchange ("NYSE") commenced operation of its Central Certificate Service ("CCS") a securities depository established to serve NYSE member firms, which was designed to alleviate these problems. Certificates which were deposited by NYSE member firms with CCS were registered in the name of the NYSE's nominee, Cede & Co., so that they could be

---

1 *See* N.Y. Uniform Commercial Code § 8-320 (McKinney 1964)

2 *See* 15 U.S.C.A. § 78q-1 (1981)

expeditiously delivered, appropriately endorsed to others. The use of nominee name to facilitate the transfer of securities was not a novel practice when CCS was founded:

> Nominee registration is an old arrangement primarily used by insurance companies, mutual funds, brokerage houses, banks and trust companies. The practice was begun to avoid requirements of registrations and to facilitate securities delivery . . . Generally securities registered in the name of fiduciaries that require documentation for transfer are not considered to be in good deliverable form to settle a contract. The selling broker, therefore, must transfer the shares into his or her nominee name before delivery. To avoid this double transfer and extensive documentation, financial institutions adopted the practice of leaving the securities in their nominee name . . . A nominee is a partnership formed to facilitate securities transactions. Each general partner is authorized to make transfers on behalf of the nominee partnership. There is widespread use of nominee ownership in American corporations. The New York Stock Exchange periodically prepares a census of shareowners of most publicly held corporations. The reports indicate that the percentage of securities held by nominees has increased substantially since 1952." M. Torosian, *Securities Transfer: Principles and Procedures* 127-128 (1988) *See Also*, E. Guttman, *Modern Securities Transfers* ¶4.04 [1] [d] at 4-16. (1987).

[p. 3] Thus, using a nominee partnership as the registered owner of securities is a well established practice which is primarily designed to facilitate the settlement of securities trades; the role of the nominee in receiving and crediting dividend and interest distributions is merely an ancillary outgrowth of modern settlement systems.

Although the efficiencies realized by CCS were substantial, they were not adequate to deal with the paperwork crisis because banks and non-NYSE brokers could not participate in CCS. In 1970, agreement was reached by the NYSE, the American Stock Exchange, the National Association of Securities Dealers, and the New York Clearing House Banks to form an interindustry organization, the Banking and Securities Industry Committee ("BASIC"), to study the problems causing the paperwork crisis and seek solutions.

The BASIC committee considered the possibility of creating a transfer agent depository or TAD. Under the TAD proposal, the depository would act as a *transfer agent* for the issuer. However, after careful consideration of the TAD proposal, the BASIC committee *rejected it*--proposing instead the establishment of a comprehensive securities depository system which could be built upon the existing CCS system. [p. 4] Thus, DTC was developed as a depository for the benefit of its users or Participants, *not* a depository acting as an agent for issuers.[3]

Pursuant to the plans developed by the BASIC committee, DTC was incorporated in 1973 as a limited purpose trust company to acquire the business of CCS and to expand the benefits of the depository approach to others in the financial

---

[3] DTC has contracts with its Participants which will be produced to the parties and which incorporate DTC's rules by reference. In contrast, except in the case of Book Entry Only issues (which do not give rise to abandoned property, as more fully described below), where issuers and their agents make certain written representations to DTC, DTC has no contractual relations with issuers. The only regulatory obligation that DTC has to issuers is to provide them with a Security Position Listing for a fee upon request. *See* Rule 17Ad-8.

industry, particularly banks.[4]

* * *

[p. 11] **DIVIDEND ANNOUNCEMENTS, LATE DEPOSITS, AND SECURITIES IN TRANSFER**

DTC learns of upcoming distributions from issuers and subscription services and by monitoring Exchange publications and the financial press. It announces upcoming record dates to its Participants so they will be able to verify receipts from DTC. In addition, the announcements advise Participants that they must stamp deposit tickets accompanying deposits close to record date with a legend requesting special-handling by DTC. Since DTC gives immediate credit for deposited securities to the Participant upon deposit, it will pay the upcoming distribution to that Participant, and therefore DTC must take special steps to insure that the certificate which has been deposited will be cancelled and re-registered quickly enough for Cede & Co. to be the record owner on record date.

[p. 12] Securities in process of withdrawal by the WT or RWT method (as opposed to urgent COD withdrawals) will be shown as "in transfer" on DTC's books on record date and therefore the Participant withdrawing the securities will not receive the distribution from DTC. Instead, the new registered owner will receive the distribution directly from

---

[4] The Securities Industry Automation Corporation ("SIAC") was incorporated by the NYSE and American Stock Exchange ("AMEX") during this time period. SIAC plans, develops, implements and manages a variety of automated information-handling and communications systems for the NYSE, the AMEX and the National Securities Clearing Corporation ("NSCC"). SIAC and DTC lease office space in the same building and have entered into contractual relationships relating to shared space. However, SIAC does not perform any facilities management functions for DTC and is not involved in the distribution system for dividend and interest payments.

the issuer's agent.[5]

* * *

[p. 14] **FORMS OF TRANSACTIONS THAT GIVE RISE TO ARGUABLY ESCHEATABLE PROPERTY AT DTC**

For distributions payable in DTC's NDFS system, DTC compares the distribution received from the Paying Agent to the net of all Participants' long, short, and pledged positions on DTC's books on Record Date, and the resulting balance, will be an underpayment or an overpayment.[6] In time, a portion of an overpayment may become arguably escheatable. In order to understand how escheatable property arises at DTC, it is necessary to distinguish between overpayments, unclaimed dividends, "Cede float" and errors.

An overpayment is cash or stock from the Paying Agent that exceeds the distribution computed from Participants' accumulated long, short and pledged positions on DTC's books on Record Date. [p. 15] Overpayments may result from out-of-balance conditions between DTC's records and the issuer's, or they may be attributable to a phenomenon in fully certificated issues, including certain FAST issues which

---

5 If, because of a delay in registration, DTC receives the payment instead of the new owner, DTC will experience an overpayment. DTC monitors these WT's and if DTC receives an overpayment because re-registration followed Record Date, DTC pays the distribution to the Participant through an adjustment journal entry. Discrepancies in information received from the transfer agents could give rise to abandoned property as more fully described below.

6 Since underpayments do not give rise to arguably escheatable property unless in the process of correction they are transmuted into overpayments, the causes and resolution of underpayments will not be discussed here.

is referred to as the "Cede float."[7]

CEDE FLOAT AND ABANDONED PROPERTY

For BEO issues, since Cede can be the only record owner of the securities, DTC knows the size of the entire Cede & Co. position on the issuer's books. Moreover, the accumulated Participant positions on DTC's books equal the entire Cede & Co. position on the issuer's books. Since, as explained above, the address of DTC Participants and their successors cannot be lost, theoretically all overpayments in these issues are errors, not debts. Although DTC has never had an unresolved overpayment in a BEO issue after three years, if an overpayment were not resolved in that time frame it would not be deemed abandoned under New York law.

[p. 16] However, in the case of fully certificated registered issues and half FAST issues,[8] it is usually the case that the

---

[7] Distributions paid to DTC's Participants on their verified record date positions never evolve into escheatable property at the DTC level, because DTC's few closely monitored Participants can not get lost. Even if they go out of business, a receiver or trustee will be the proper recipient of the distribution from DTC. Even if they could get lost, DTC would have their last addresses. Unpaid debts whose creditors last addresses are known are not in issue in this case.

[8] Since the bearer bonds in DTC's custody should balance exactly the accumulated Participant positions on DTC's books and since the coupons or bonds DTC presents for income or redemption collection must also balance Participants' positions, overpayments on bearer distributions are subject to error resolution and do not evolve into abandoned property. A tiny amount of the property deemed abandoned and subject to custodial taking by the state consists of "found" bearer bonds, our classification of a loose bond occasionally found in the vault whose unique number is not recorded in DTC's vault records and for which DTC has no record (such as a deposit slip) of the Participant who delivered it to DTC for safekeeping. In the opinion of DTC's counsel, these items escheat as lost property, not

total position of DTC's Participants on DTC's books will not equal the number of securities that are registered in the name of Cede & Co. on the issuer's books. That is because certificates registered in the name of Cede & Co. have been withdrawn from DTC by COD before record date and may be "floating" around in the stream of commerce for some time before they are re-registered.

A detailed explanation of DTC's procedures for honoring urgent withdrawals or COD's in fully certificated registered issues and half FAST issues may clarify the concept of Cede float and its potential for creating debt due unknown owners that may escheat:

1. DTC, upon receipt of the COD removes a certificate in the proper denomination registered to Cede & Co. from the vault;
2. debits the long position on DTC's books of the withdrawing Participants;
3. deletes the certificate number from the record of certificates on deposit and reduces the vault position;
[p. 17] 4. endorses the certificate with the facsimile signature of Cede & Co.; and
5. gives the physical certificate to the Participant.

When the certificate is withdrawn from DTC's vault, it enters the stream of commerce outside the depository. Cede & Co. is still the registered owner known to the issuer. Whether and when the recipient of a certificate registered in the name of Cede & co. submits the certificate for re-registration is entirely within the control of the recipient. DTC has no way of knowing how many hands such a certificate passes through or whether at any point in time it is still outstanding. During the period from when the

---

distributions whose beneficial owner cannot be found.

certificate leaves DTC until it is re-registered it is called by DTC "Code Host." While DTC knows who withdrew Code Host, the withdrawing Participant is unlikely still to be the owner of Code Host not promptly reregistered. It is presumed the Participant withdrew the COD to make physical delivery to a party unknown to DTC. Thus, the withdrawing Participant's address is not considered to be the "last known address of the creditor" for the unclaimed distribution.

On payable date for a distribution to security holders, the paying agent sends DTC distributions on all securities evidenced by certificates of which Cede & Co. was the registered owner on the record date. This includes both certificates which are still in the depository system and the Cede Host. After Cede & Co. pays distributions to all Participants having long positions on DTC's records on the record date, at least a portion of any remaining balance is assumed to be applicable to the Cede Host rather than were error or out-of-balance conditions. The balance [p. 18] of distributions received from the paying agent is thereafter recorded in the "Unclaimed Dividends" account. These funds and property do not belong to DTC. They belong instead to the unknown beneficial (not record) owner on the record date.

* * *

Stipulation of Agreed Facts:

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER

In The Matter Of The Application
Of The Office Of The State
Comptroller, Petitioner, For A
Certification That Certain
Property Held By Paine Wappet
Jackson & Curtis, Incorporated,
Respondent, Be Deemed Abandoned
Property

STIPULATION OF AGREED FACTS

Before Hearing Officer Daniel Coleman:

WHEREAS a controversy exists between the parties hereto, it is hereby stipulated and agreed by and between the undersigned counsel for the respective parties that the following facts are not in dispute:

* * *

1. The books and records maintained by Paine Wappet do not reveal the identity of, or any last known addresses for, any persons to whom such dividends, interest or cash may be owed, nor do such books and records reveal whether Paine Wappet is the owner of such property.

* * *

* * *

ACCOUNTS NOT REPORTABLE - Deposits held at a foreign or out of state branch of a New York bank are not subject to the Abandoned Property Law. However, funds held at an International Banking Facility (IBF) established in New York are subject to the statute.

* * *

ARTICLE III
BANKING INSTITUTIONS

FREQUENTLY RAISED BY REPORTING ORGANIZATIONS

X. CLARIFICATION OF ISSUES MOST [p. 35]

* * *

OFFICE OF UNCLAIMED FUNDS
STATE OF NEW YORK

STATE COMPTROLLER
EDWARD V. REGAN

1988

[SEAL OF THE STATE OF NEW YORK]

SECOND EDITION

UNCLAIMED FUNDS
HANDBOOK FOR REPORTERS OF

Reporters of Unclaimed Funds (2d ed. 1988):
New York Office of Unclaimed Funds. Handbook for

[p. 40] **STOCKBROKERS**
(ARTICLE V-A)

1. Unclaimed amounts received in this state and securities held in this state for unknown parties or addressees unknown are subject to Article V-A of the New York State Abandoned Property Law regardless of whether or not the broker is incorporated in New York.

* * *

New York Office of the State Comptroller, Abandoned Property Law Handbook for Brokers and Dealers (1983):

ABANDONED PROPERTY LAW
HANDBOOK
FOR
BROKERS AND DEALERS

1983 EDITION

[SEAL OF THE STATE OF NEW YORK]

EDWARD V. REGAN
STATE COMPTROLLER

STATE OF NEW YORK
OFFICE OF THE STATE COMPTROLLER
ALBANY, NEW YORK 12236

[PHOTO]

* * *

PART 3

EXPLANATORY COMMENTS
ON
ARTICLE V-A

ABANDONED PROPERTY LAW
ITEMS DEFINED AS ABANDONED PROPERTY

An unclaimed amount owing by a broker or dealer is deemed abandoned property under one of six classifications established in Section 211. A seventh classification (Sec. 211.8) ceased to be effective after December 31, 1972.

1. The first class includes (a) any cash dividend and bond interest received in this state by a broker or dealer (or nominee) as the holder of record of a security which has remained unpaid to the person or persons entitled thereto for a period of three years following receipt, and (b) cash dividends and bond interest payable on or with respect to a security which has been deemed abandoned. The unpaid amount in category (a) often occurs when the broker or dealer ceases to hold the security at the time of receipt of the dividend or bond interest, the security having already been redeemed, and the person or customer entitled to such payment cannot be identified (unknown). The unpaid amount in category (b) are not subject to a three year waiting period and are reported as abandoned property, if held, as soon as the security involved has been deemed abandoned or upon receipt, if received thereafter.

These unpaid amounts are reported in Schedule A of the Abandoned Property Report (Sec. 211, Subd. 1)

* * *

4. The fourth class consists of any securities held in this state for a customer or unknown person by a broker or dealer (or nominee), as the holder of record of a security where for future successive years, all amounts held on the security by such broker or dealer (or nominee) have remained unclaimed. This class also includes any stock dividends received on such securities. These dividends are deemed abandoned when received. This class of unclaimed property generally results from an inability to identify the owner of the security, to locate the owner of a dormant customer account or to have a customer accept delivery of his securities or amounts held thereon to which he is entitled. The unknown owner situation often occurs as discussed in subparagraph 1 above when a stock dividend is received by the broker or dealer after the underlying security had already been treated and delivered.

These securities are to be reported in Schedule C of the abandoned property report. (Sec. 211).

However, it is any time within the first years preceding the thirty-first day of December in any year, a broker or dealer has received from his customer evidence in writing indicating that the customer is aware of the existence of the account in which the unclaimed amount of security is recorded, then such unclaimed amount of security and the balance in the account shall not be deemed abandoned property. The first years dormancy period preceding abandonment recommences with each such written contact. (Sec. 211, Subd. 3, last paragraph).

* * *

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 111 Original

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,
and
STATE OF TEXAS,
Intervening Plaintiff,
v.
STATE OF NEW YORK,
Defendant.

On Exceptions to the Special Master's Report

MOTION FOR LEAVE TO FILE BRIEF IN REPLY FOR PLAINTIFF, STATE OF DELAWARE, AND BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN REPLY TO THE BRIEFS OF THE TEXAS GROUP INTERVENORS

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Plaintiff, State of Delaware

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

August 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

No. 111 Original

STATE OF DELAWARE,

and *Plaintiff*,

STATE OF TEXAS,

Intervening Plaintiff,

v.

STATE OF NEW YORK,

Defendant.

On Exceptions to the Special Master's Report

MOTION FOR LEAVE TO FILE BRIEF IN REPLY TO THE BRIEFS OF THE TEXAS GROUP INTERVENORS FOR PLAINTIFF, STATE OF DELAWARE

Plaintiff, State of Delaware, by its undersigned counsel, hereby respectfully moves for leave to file the attached Reply Brief.

In our Brief in support of Delaware's Exceptions to the Master's Report (filed May 26, 1992), we set out the reasons why the Report's two recommended departures from the *Texas* rule should not be adopted. Defendant, New York, and a group of putative Intervenors led by Michigan (the "Michigan group") each also filed exceptions and briefs at that time, setting forth their cases in chief. Briefs in response to each of these three opening

briefs were filed on July 27, 1992, by: Delaware; New York; the Michigan group; and each of the two subgroups of the putative Intervenors led by Texas (collectively, the "Texas group"). The Texas group's two briefs set out *its* primary case in chief, which defends the Report in all respects. The attached Reply Brief closes the circle by replying to the Texas group's two briefs.

While the Order of the Court setting the briefing schedule in this matter did not expressly provide for the filing of a reply brief in support of their exceptions by those parties filing exceptions, we submit that filing such a reply brief would be helpful to the Court in deciding this case. This would follow the usual practice in cases on the appellate docket, where the rules expressly contemplate and permit the filing of reply briefs (subject to stringent time limits with which we have complied) by the petitioners or appellants—parties situated similarly to Delaware insofar as it and the Texas Intervenors are concerned.

Delaware therefore respectfully moves for leave to file the attached Reply Brief.

Respectfully submitted,

DENNIS G. LYONS
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700
Counsel of Record for
Plaintiff, State of Delaware

August 1992

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ARGUMENT	5
I. THE TEXAS INTERVENORS HAVE PRESENTED NO LEGITIMATE JUSTIFICATION FOR ABANDONING THE "STATE OF INCORPORATION" RULE	5
A. No Recent Developments Justify a Departure From the *Texas* Rule	5
B. Intervenors' "Fairness" Arguments Are Misguided	10
C. The Texas Intervenors Fail to Confront the Precedential Nature of the Changes They Urge	13
II. THE STATE-LAW DEBTOR IS THE "DEBTOR" UNDER THE *TEXAS* RULE	14
A. "Debtor" Means "Debtor"	14
B. The Court Should Not Start Down the Path of Developing a Federal Common Law of Escheat Priorities on a Case-By-Case Basis	14
C. The Holders of Unclaimed Property in This Case Are Always Debtors Who Owe Money to Unknown Creditors Under State Law	16
CONCLUSION	22

TABLE OF AUTHORITIES

Cases: Page

Allied-Signal, Inc. v. *Director, Div. of Taxation*, 112 S. Ct. 2251 (1992) 2

Brooks v. *United States*, 833 F.2d 1136 (4th Cir. 1987) 7

Clarke v. *New York Trust Co. (In re Associated Gas & Elec.)*, 137 F.2d 607 (2d Cir. 1943) 20

CTS Corp. v. *Dynamics Corp. of Am.*, 481 U.S. 69 (1987) 12

Davis v. *Fraser*, 307 N.Y. 433, 121 N.E.2d 406 (1954) 21

Dimmitt & Owens Fin., Inc. v. *United States*, 787 F.2d 1186 (7th Cir. 1986) 7

Hilton v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560 (1991) 2

Keech v. *Zenith Radio Corp.*, 276 A.2d 270 (Del. Ch. 1971) 21

Merrill Lynch Pierce Fenner & Smith, Inc. v. *North Eur. Oil Royalty Trust*, 490 A.2d 558 (Del. 1985) 21

In re Metro Communications, Inc., 95 B.R. 921 (Bankr. W.D. Pa. 1989), *rev'd sub nom. Mellon Bank, N.A.* v. *Metro Communications, Inc.*, 945 F.2d 635 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1476 (1992) 7

Oregon ex rel. State Land Bd. v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) 15

Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 2

Pennsylvania v. *New York*, 407 U.S. 206 (1972) 3, 14, 14-15

Quill Corp. v. *North Dakota*, 112 S. Ct. 1904 (1992) 2, 4

S. D'Antoni, Inc. v. *Great Atl. & Pac. Tea Co.*, 496 F.2d 1378 (5th Cir. 1974) 7

State v. *Jefferson Lake Sulphur Co.*, 36 N.J. 577, 178 A.2d 329, *appeal dismissed & cert. denied*, 370 U.S. 158 (1962) 20

Texas v. *New Jersey*, 379 U.S. 678 (1965) ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
United States v. *Maine*, 420 U.S. 515 (1975)	2
Walker v. *Armco Steel Corp.*, 446 U.S. 740 (1980)	2
Western Union Tel. Co. v. *Pennsylvania*, 368 U.S. 71 (1961)	4
Constitutional Provisions:	
U.S. Const. art. I, § 8, cl. 3 (Commerce Clause)	4
U.S. Const. amend. XIV, § 1 (Due Process Clause)	4
U.S. Const. amend. XIV, § 5 (Enabling Clause)	4
Statutes:	
Disposition of Abandoned Money Orders and Traveler's Checks Act, Pub. L. No. 93-495, Title VI, 88 Stat. 1500, 1525 (1974) (codified at 12 U.S.C. §§ 2501 to 2503 (1988))	
Section 601, 12 U.S.C. § 2501 (1988)	4
Federal Tax Lien Act of 1966, Pub. L. No. 89-719, § 101(a), 80 Stat. 1125 (codified as amended at I.R.C. § 6323)	5, 6, 7
I.R.C. § 6323(f)(2)	5
Securities Act of 1933, Pub. L. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a to 77mm (1988 & Supp. II 1990))	9
Securities Exchange Act of 1934, Pub. L. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a to 78hh (1988 & Supp. II 1990))	9
Securities Investor Protection Act of 1970, Pub. L. No. 91-598, 84 Stat. 1636 (codified as amended at 15 U.S.C. §§ 78aaa to 78*lll* (1988))	19
Trust Indenture Act of 1939, Pub. L. No. 76-253, 53 Stat. 1149 (codified as amended at 15 U.S.C. §§ 77aaa to 77bbbb (1988 & Supp. II 1990))	
Section 317(b) (15 U.S.C. § 77qqq(b) (Supp. II 1990))	18
Model Acts and Uniform Codes:	
Model Business Corporation Act Ann. (2d ed. 1991)	
Section 7.23	22

TABLE OF AUTHORITIES—Continued

	Page
Uniform Commercial Code, 2-3 Uniform Laws Ann. (1981-1991)	
Section 8-207(1)	16, 21
Section 9-103(3)(d) (rev. 1972)	5, 6, 7
Legislative and Administrative Materials:	
H.R. Rep. No. 1613, 91st Cong., 2d Sess., *reprinted in* 1970 U.S.C.C.A.N. 5254	19
Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities (Dec. 3, 1976)	10
SEC Form 10-K	
1965 Version, 27 Fed. Reg. 7,869, 7,871 (Aug. 9, 1962), 17 C.F.R. § 249.310 (1964)	9
Current Version, 4 Fed. Sec. L. Rep. (CCH) ¶ 31,102 (1992)	9
SEC Form S-1	
1965 Version, 29 Fed. Reg. 12,676 (Sept. 9, 1964), 17 C.F.R. § 239.11 (1965)	9
Current Version, 2 Fed. Sec. L. Rep. (CCH) ¶ 7,121 (1992)	9
Other Authorities:	
American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* (1986)	18, 19
William F. Fratcher, *Scott on Trusts* (4th ed. 1987)	18
Mobil Corp., 10-Q Report, First Quarter 1992	11
Report of the Special Master, *Texas* v. *New Jersey*, No. 13 Original (filed Dec. 2, 1963)	19
Texaco, Inc., 10-Q Report, First Quarter 1992	11

BRIEF FOR PLAINTIFF, STATE OF DELAWARE, IN REPLY TO THE BRIEFS OF THE TEXAS GROUP INTERVENORS

Plaintiff, State of Delaware ("Delaware"), respectfully submits this Reply Brief in response to the two briefs filed by the Texas group of putative Intervenors (the "Texas group" or the "Texas Intervenors").[1]

INTRODUCTION

The Texas Intervenors' defense of the Report lacks the candor of the Michigan group's. The Texas group's central theme is one of denial—denial that *stare decisis* is implicated by this case; denial that Congress, not this Court, would be the proper institution to alter or make *ad hoc* exceptions to the *Texas* rule; and denial that this case will have precedential effect in the future.

1. The Texas Intervenors fail to come to grips with the fundamental *stare decisis* concerns raised by the Report. Their assertion that the doctrine does not have "decisive effect" in this case (Tex. Br. 52) is mainly based on the misapprehension that "this case does not directly implicate the reliance interests of private persons." Tex. Br. 50; *accord* Ala. Br. 52. *Amici*—the private persons whose interests are said not to be implicated—strongly disagree. They have sought leave to file a brief explaining the ways in which the Report's recommendations would have a substantial, adverse impact on them. *See Amici Curiae* Brief of Securities Industry Ass'n, *et al.* (filed May 26, 1992). As for the other factors that give the doctrine of *stare decisis* special force in this case (*see* Del. Opening Br. 70-74; Del. Answering Br. 7), Intervenors do not even acknowledge any of them.

[1] We have referred to the two subgroups of the Texas group as the Arizona subgroup and the Alabama subgroup. The brief filed by the Arizona subgroup is denominated on its face as being filed by Texas and others; we will refer to it as the "Tex. Br.," and to the Alabama subgroup's brief as the "Ala. Br."

Stare decisis is not without limits; this Court has articulated a jurisprudence to guide it in evaluating whether to depart from precedent.[2] But Intervenors eschew that jurisprudence in favor of a more impulse-driven view of *stare decisis*. They do not argue that the present rules are no longer sound as a matter of legal principle, and they do not assert that the present rules are unworkable in practice. Instead, they seem to confine themselves to a single justification for abandoning the *Texas* backup rule—their view that as applied to this case the current rule does not comport with "the sense of justice." *See* Ala. Br. 52 n.79.

Leaving aside whether such a rationale is appropriate where Congress is able to alter the Court's rules, the Intervenors' view of the fairness of the rule appears to be too narrow. By focusing only on "owner address unknown" securities distributions, Intervenors attempt to make it seem as though Delaware is hogging a disproportionate share of the intangible property escheated each year. But Delaware currently collects only about 2% of the total moneys in all categories escheated annually by the fifty states.[3] And the property seized by New York from Delaware brokerage corporations, which is all that Delaware seeks in this case, amounted to approximately $8.2 million a year over a seventeen-year period.[4] This

---

[2] *See* Del. Opening Br. 70-76 (discussing, *inter alia*, *Hilton* v. *South Carolina Pub. Rys. Comm'n*, 112 S. Ct. 560, 563-64 (1991); *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-75 (1989); *Walker* v. *Armco Steel Corp.*, 446 U.S. 740, 749 (1980); *United States* v. *Maine*, 420 U.S. 515, 527 (1975)); Del. Answering Br. 7-13 (discussing, *inter alia*, *Allied-Signal, Inc.* v. *Director, Div. of Taxation*, 112 S. Ct. 2251, 2261-62 (1992); *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-16 (1992)).

[3] Delaware collects approximately $20 million a year; the National Association of Unclaimed Property Administrators reports annual collections of roughly a billion dollars for all states. See the materials cited in Del. Opening Br. 60.

[4] The total amount seized by New York from Delaware brokerage corporations was $139 million during the entire period from 1972

would increase Delaware's share of the total escheatable amounts by less than 1% per year. Moreover, there is reason to believe that by far the larger proportion of unclaimed *securities distributions* is escheatable under the primary rule. *See* Del. Opening Br. 12-14 n.17.[5] Thus, even assuming, *arguendo*, that Intervenors' population-based evaluation of fairness were "justice" (and that this Court, rather than Congress, should be making such a decision), the current distribution of unclaimed intangible property among the states cannot be said to offend the "sense of justice" at all, let alone enough to throw into doubt the settled rules governing escheat.

2. The Texas Intervenors' failure to come to grips with the doctrine of *stare decisis* is most obvious in their treatment of *Pennsylvania* v. *New York*, 407 U.S. 206 (1972). They do not acknowledge that in that case the Court evaluated the precise question they present here—whether the backup rule should be changed when it is suggested that a large proportion of one or another type of property will escheat to the state of the holder's incorporation. They dismiss the *Pennsylvania* case as being unimportant because Congress, by legislation, changed the case's result. But, as the Michigan group candidly points out, "[n]othing in the words or history of [the statute] in which Congress reversed the result in *Pennsylvania* v. *New York* suggests that Congress was occupying or even generally entering this field." Mich. Answering Br. 10.

---

through 1988. (Del. Opening Br. 20-21 & n.31; 13-14 n.17.) (It is forecast that the sort of escheatable "overages" involved in this case will decline in the future. DeCesare Dep. 79-83; Cirrito Dep. 150-53.) This case's scope greatly increased with the coming of the Intervenors, who urged that the "issuer" be considered the "debtor" for the purpose of the Intervenors' obtaining escheatable funds held by the Depository Trust Company and the New York banks, which are New York-domiciled and as to which funds Delaware makes no claim.

[5] The Arizona subgroup does not dispute our statistics, and the Alabama subgroup appears to agree with them. *See* Ala. Br. 32-33 n.41; 40 n.56.

There can, of course, be no serious question about whether Congress *could* occupy or enter this field: Congress specifically invoked the Commerce Clause in enacting the legislation,[6] and surely the disposition of unclaimed securities distributions is within Congress' Commerce Clause powers. The Fourteenth Amendment also gives Congress the authority to alter the Court's rules in this area.[7] That Congress has not altered the *Texas* rule in its many visits to the escheat field—but may if it wants—is a strong reason to defer to Congress here. The Court recently confirmed that, in such circumstances, the present rules should not be judicially discarded. *Quill Corp.* v. *North Dakota*, 112 S. Ct. 1904, 1914-16 (1992).

3. Finally, Intervenors offer the Court no limiting principle for the rule changes they urge. The Intervenors act as though this case were an isolated event that will have no precedential effect. They act as though "ambiguity" can be "teased out" in the meaning of the word "debtor," but not in other elements of the rule. And they act as though the special rules they seek for distributions on publicly-traded securities will not lead to requests for special treatment for other types of property. They are wrong. This Court's goal—a "clear rule" designed to settle the conflict "once and for all," *Texas* v. *New Jersey*, 379 U.S. 674, 678 (1965)—would be subverted by what they urge. There is every reason to expect that if the Court were to "interpret" and "modify" the backup rule in the way the Texas group suggests, other states and groups of states will soon request that newly discovered "ambiguities" be resolved in their favor,

---

[6] *See* Pub. L. No. 93-495, Title VI, § 601(4) & (5), 88 Stat. 1500, 1525 (1974) (codified at 12 U.S.C. § 2501(4) & (5) (1988)).

[7] The Court has held that the Due Process Clause protects a person from being subject to liability to more than one state to escheat a single piece of unclaimed property. *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961). Section 5 of the Fourteenth Amendment provides Congress with the authority to implement the Amendment by appropriate legislation.

and that new exceptions be made for other kinds of property.

ARGUMENT

I. THE TEXAS INTERVENORS HAVE PRESENTED NO LEGITIMATE JUSTIFICATION FOR ABANDONING THE "STATE OF INCORPORATION" RULE

For the most part, the Texas Intervenors urge a sort of plebiscite approach to the resolution of this issue. *See* Ala. Br. 46; Tex. Br. 50 (tallying the current positions). Plebiscites at an earlier stage of the case would have gone the other way. It was not until the Master's spontaneous suggestion that the present rule be discarded that the Texas Intervenors embraced this theory.[8] Unembarrassed by their earlier position, the Texas Intervenors make a series of misguided arguments. They erroneously assert that recent developments make their proposal easy to implement; they misweigh the relative benefits provided by the state of incorporation and the state of a corporation's principal executive office; and they fail to confront the precedential implications of the changes they urge.

A. No Recent Developments Justify a Departure From the *Texas* Rule

In an effort to demonstrate that implementation of the Master's proposal would be "easy," the Texas Intervenors offer up a series of *post hoc* rationalizations for their new-found desire to change the backup rule: they say that "experience" under the 1972 revision of U.C.C. § 9-103(3)(d) and under the 1966 revision of the Federal Tax Lien Act[9] is a "change in the law" justifying the departure (Tex. Br. 52-53 & n.38); they point to (old) SEC

---

[8] See our scorecard on this and other changes in position, Del. Answering Br. App. A.

[9] Pub. L. No. 89-719, § 101(a), 80 Stat. 1125, 1125-31 (1966) (codified at I.R.C. § 6323(f)(2)).

regulations requiring issuers to list a principal executive office (Tex. Br. 52 n.38; Ala. Br. 49-51); and they claim that nominee registration is a new and "dramatic[]" development requiring revision of the "state of incorporation" rule (Tex. Br. 7, 54).

These rationalizations do nothing to demonstrate that any of the Court's *stare decisis* criteria have been met. Alleged ease of implementation of a *new* rule is generally not recognized as a reason to depart from an old rule. Moreover, none of these so-called developments support the assertion that the "principal executive office" rule would be easy to implement.

1. Only the Arizona subgroup relies on U.C.C. § 9-103 (3)(d) and on the Tax Lien Act, which it claims are a "change in the law." Tex. Br. 52 & n.38. Neither statute is recent; they date from 1972 and 1966. Both statutes require, in limited circumstances, that filings be made in a location determined by a corporation's "principal executive office" in order to perfect commercial security interests or federal tax liens. But both statutes are recognized as requiring an inherently subjective judgment; and experience with them demonstrates that the "principal executive office" test does not provide the certainty that the *Texas* rule's "state of incorporation" test does.

As we demonstrated in our opening brief, U.C.C. § 9-103(3)(d) requires a fact-specific, multi-factor judgment; litigation over the location of a "principal executive office" is common under the statute; and that the statute surely would cause more problems were it not for lawyers' cautious practice of filing in multiple jurisdictions in the event of any doubt. *See* Del. Opening Br. 57-58. The Intervenors do not deny any of this, but instead point out that the "principal executive office" is generally easier to identify than "principal place of business." Intervenors make the wrong comparison: they do not, and cannot, assert that their proposed rule is easier

to apply than the present one. The cases they cite (Tex. Br. 53) comparing a "principal executive office" test favorably to a "principal place of business" test also demonstrate that even the former test is fact-based and subject to litigation. Indeed, the Arizona subgroup fails to observe that one of the decisions it cites was reversed on appeal as having chosen—after a trial—the wrong office as the "principal" one. *In re Metro Communications, Inc.*, 95 B.R. 921, 926-30 (Bankr. W.D. Pa. 1989), *rev'd sub nom. Mellon Bank, N.A.* v. *Metro Communications, Inc.*, 945 F.2d 635, 643-44 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1476 (1992).

The same flaws inhere in the Arizona subgroup's reliance on the Federal Tax Lien Act. Again, Intervenors merely point out that its test is better than the "principal place of business" test. Tex. Br. 53. They do not mention that experience has revealed the "principal executive office" test to be as uncertain for the IRS as it is for commercial creditors under U.C.C. § 9-103(3)(d). As one court has observed, "[i]n the case of a corporation with multiple offices, *any* test directed at determining the most important office is to some extent subjective. Creditors and the Government could in good faith reach different conclusions as to the appropriate location for filing of federal tax liens." *S. D'Antoni, Inc.* v. *Great Atl. & Pac. Tea Co.*, 496 F.2d 1378, 1383 (5th Cir. 1974) (emphasis supplied). Other courts have also struggled to determine the proper location of a "principal executive office" under this statute. *E.g.*, *Brooks* v. *United States*, 833 F.2d 1136, 1144-45 (4th Cir. 1987); *Dimmitt & Owens Fin., Inc.* v. *United States*, 787 F.2d 1186, 1191-92 (7th Cir. 1986). As under U.C.C. § 9-103(3)(d), the only safety valve is multiple filings. But the analog in the escheat area to a secured party's filing in two states is a conflicting claim by two states—the very thing that the *Texas* rule was designed to prevent.

2. The Texas Intervenors attempt to resuscitate their argument that a "principal executive office" test is at all

workable by relying on SEC regulations requiring publicly-traded companies to list such an office. Indeed, this is all that is offered by the Alabama subgroup. Of course, the SEC regulations cover only publicly-traded corporations—not even their subsidiaries, which will often have substantial unclaimed property, are covered. And in response to our demonstration that the SEC regulations are utterly useless *outside* of this narrow area (Del. Opening Br. 59-61), the Intervenors say only that in every case other than this one, "holders" will also be "originators," and thus will know in which state their own principal executive offices are located. Ala. Br. 53 n.80. The question is not whether the party in whose hands property is subject to escheat knows where its own "principal executive offices" are.[10] The question is whether, in the event of a contest between two or more states, the issue is easily resolved without adjudication. The Master and the Intervenors say that, in the case of SEC issuers, the issuers' designation in their SEC filings should be conclusive; but beyond that narrow area, the possibilities for dispute are significant.[11]

---

[10] Intervenors do not suggest that, outside of the SEC-registrant area, the holder (or whoever else the Intervenors claim is "debtor") can conclusively decide this issue as between the two contesting states.

[11] The Alabama subgroup's answer also points up the unusual nature of the "originator-as-debtor" rule it urges, which requires the holder to ascertain some or another piece of data about an "originator." In all its other applications, the *Texas* rule does not require the holder of the unclaimed funds to do research about any party other than the "creditor." Speaking volumes about the special nature of the rule they seek in the "issuer as debtor" context, Intervenors suggest that the situation of the "holder" *not* being the "debtor" will be rare outside of the present case. Ala. Br. 53 n.80. But even in the present context, finding the "originator" poses some perplexities. Consider the case of "conduit" issuers, such as mutual funds, collateralized obligation trusts, and the like. *See* Del. Opening Br. 51 n.64. Who are the "originators" there? Dozens or even hundreds of underlying issuers, in the case of mutual funds; thousands of geographically diverse homeowners, in the case of col-

It must be remembered that the "principal executive office" test for SEC registrants was available to the Court at the time of the *Texas* decision in 1965. SEC filing requirements in 1965 included a cover-page designation of a principal executive office, both under the Securities and the Securities Exchange Acts.[12] The Court in *Texas* rejected Pennsylvania's claim to the money at issue in that case based on the location of Sun Oil Company's principal executive offices, which were in Philadelphia (where no oil was produced, but where executives were headquartered). The Court concluded that "application of the rule [urged by Pennsylvania] would raise in every case the sometimes difficult question of where a company's 'main office' or 'principal place of business' or whatever it might be designated is located," because it leaves too much for "decision on a case-by-case basis." 379 U.S. at 680. The concept of a "principal executive office" or the SEC requirement that one be listed for its registrants is not a new star in the legal heavens; the Court rejected this test in 1965.

3. Finally, the Arizona subgroup claims to have identified "sweeping technological developments . . . including the changeover to depositories and nominee registration," which, it says, justify abandonment of the "state of incorporation" rule. Tex. Br. 54. We are unable to perceive a logical connection between an increase in the incidence of nominee registration and a need to abandon the

---

lateralized mortgage pools. The Master's rule requires these "conduit" holders to escheat "owner/address unknown" funds to the states of all of their respective "originators." Searching for the "originator" is not workable.

[12] *See* Form S-1, 29 Fed. Reg. 12,676, 12,676 (Sept. 9, 1964), 17 C.F.R. § 239.11(a) (1965); Form 10-K, 27 Fed. Reg. 7,869, 7,871 (Aug. 9, 1962), 17 C.F.R. § 249.310(a)(3) (1964). Then and today, of course, SEC Form 10-K also required and requires a cover-page designation of the corporation's state of incorporation. *Id.*; 4 Fed. Sec. L. Rep. (CCH) ¶ 31,102 (1992) (current Form 10-K); *see also* 2 Fed. Sec. L. Rep. (CCH) ¶ 7,121 (1992) (current Form S-1).

present "state of incorporation" rule. In any event, the use of nominee registration was well-established by 1965, with 23.7 percent of the equity securities of publicly-owned companies in the hands of nominees.[13] The higher incidence of nominee-name registration today is hardly a "radical" change from a practice that has gone on for generations. Its pertinence to the "state of incorporation" versus "state of principal executive office" issue remains obscure.

B. Intervenors' "Fairness" Arguments Are Misguided

Intervenors' preference for the "principal executive office" test is based on the theory that it is "more likely to result in a return of funds to the jurisdictions where those funds were created." Ala. Br. 48; *see* Tex. Br. 44-45. Both the general principle and the specific test were advocated—and rejected—in 1965. The *Texas* Court refused to carve out an exception, requested by Texas, for mineral proceeds that had originated in Texas. 379 U.S. at 679 n.9. And the Court also declined to adopt a test looking to the company's "main office," "or whatever it might be designated." 379 U.S. at 680.

If anything, the Texas group's argument that there is a relationship between the main office and the company's business activities had *more* validity in 1965 than it does today. The connection between corporations' principal executive offices and their productive facilities has become increasingly attenuated. *See* Del. Opening Br. 65-68. Our description of the choices that govern where corporate executives establish their headquarters is neither "whimsical" (Ala. Br. 49) nor "fanciful" (Tex. Br. 45). We merely pointed out that these choices are often made by the management for the convenience of the senior

---

[13] *Final Report of the SEC on the Practice of Recording the Ownership of Securities in the Records of the Issuer in Other than the Name of the Beneficial Owner of Such Securities* 78 (Dec. 3, 1976).

executives,[14] and that the availability of these choices is increasingly possible because of improved communications and because of the growing disassociation, for good or bad, of the senior executives from the productive activities of the corporation. This is a major change in corporate practice; it is hardly "whimsical." These facts are well-documented in respected business publications, and are as valid as any proof in the record. Do the Intervenors really think that Texaco has found oil in Westchester County, New York, or Mobil in Fairfax County, Virginia (where their principal executive offices are recorded)?[15]

It is hard to understand how the Texas Intervenors can claim that the state where the management of the corporation chooses to headquarter its top executives identifies the jurisdiction "foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property [the dividends and interest] come into existence." Ala. Br. 47; Tex. Br. 44 (internal quotations omitted). The incorporating state provides the set of laws that governs the corporate powers, regulates the relationships among the corporation, its directors, and its stockholders, and supplies the judiciary for the resolution of corporate governance questions; the states where the plants and productive activities are located may regulate the company's day-to-day activities; but low personal income taxes on executives is the law-related factor cited by the authorities we quoted as to the choice of place for the executive headquarters. Del. Opening Br. 67. The Arizona subgroup asserts (Tex. Br. 45) that "[w]ith respect to the vast majority of com-

---

[14] A change in the state of incorporation of a corporation (generally achieved by merging into a newly-formed corporation of the desired state) requires a stockholder vote; changing the location of the principal executive office of a corporation does not.

[15] *See* Texaco, Inc., 10-Q Report, First Quarter 1992, cover page; Mobil Corp., 10-Q Report, First Quarter 1992, cover page.

panies," most, if not all, of the company's activities will occur in the same state as the executive offices. The assertion is unsupported by any record or other authority, demonstrates the lack of record support for the Master's rule change, and reflects notions as to the way large corporations are run that are more appropriate to the beginning of this century than to its end.

The Texas Intervenors also fail to acknowledge the tangible benefits that the state of incorporation gives to the corporation and its shareholders. Del. Opening Br. 68-69. The Arizona subgroup counters that the relevant inquiry is whether the state's laws provide a benefit to the "*company*, not to its shareholders." Tex. Br. 45 (emphasis supplied). But, of course, a corporation is supposed to be run for the benefit of the shareholders.[16]

The Intervenors' argument against the "state of incorporation" rule from the standpoint of fairness boils down to envious comment on the fact that Delaware has a large percentage of the incorporations of major American businesses. The Intervenors never stop to analyze why this happens to be the case, and why it has been so for the better part of this century. What is the market telling them? The Intervenors choose not to listen. The Intervenors characterize Delaware's franchise taxes as very high (Ala. Br. 47; Tex. Br. 46), but clearly this does not contribute to Delaware's popularity. The now-obsolete suggestion is made very gently that this is because of disproportionate lenity in Delaware's laws; but the comparative case study that we provided (Del. Opening Br. 63-64 n.75), as to what happened to Pennsylvania when it considered an unbalanced corporate statute, is unanswered. The truth, which the Intervenors never admit, is that the

---

[16] If we go with the Arizona subgroup in this regard and look simply at the corporation as a legal construct, obviously the case for the state of incorporation becomes even stronger. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 89-90 (1987).

state of incorporation gives the benefit of its laws and the expertise of its judiciary to the corporations it incorporates; that Delaware is preeminent in doing this; that this is a great value to the nation's corporate, financial and industrial economy; and that this is an eminently rational basis for this Court's choice of a backup rule in 1965 and its reaffirmance in 1972.

C. The Texas Intervenors Fail to Confront the Precedential Nature of the Changes They Urge

The Arizona subgroup casually assumes that the change to the "principal executive office" test could be one of "general applicability." Tex. Br. 51; *see* Ala. Br. 53 n.80 (refusing to go that far, but arguing that doing so would be "simple" and "without difficulty"). But, as we have demonstrated, a generally-applicable "principal executive office" rule would lead to tremendous administrative difficulties. *See* pp. 6-9, *supra*; Del. Opening Br. 56-61. The Texas Intervenors simply do not come to grips with these problems.

Similar dodging takes place with regard to Delaware's concerns about retroactive application to it of the rule changes supported by the Texas group. Although most of the Intervenors earlier conceded that Delaware should not be subject to retroactive application of the rule changes (*see* Del. Exceptions E-7 to E-8 & n.2; Del. Opening Br. 78-79 & n.90), the Texas Intervenors now offer only equivocation. Tex. Br. 55 n.41; Ala. Br. 56-57 n.55. Although they acknowledge the dramatically different position as to retroactivity of Delaware as compared to New York, they say that no claim has been made against Delaware in *this* case and that Delaware would not be precluded in *future cases* from making arguments about its reliance on the old rules. But Delaware in this case seeks judgment for property already taken by New York to which Delaware claims entitlement. And if the Master's proposal becomes the law of the land, retrospective claims

will be made against Delaware for disgorgement of property taken under the "state of incorporation" test of the backup rule very quickly. Delaware's reliance on the present rules has been established and is undisputed.

II. THE STATE-LAW DEBTOR IS THE "DEBTOR" UNDER THE *TEXAS* RULE

A. "Debtor" Means "Debtor"

The Intervenors do not deny that the holders in this case fit within the ordinary meaning of the word "debtor" —the holders owe money to someone, commonly referred to as a "creditor." Instead, Intervenors question the utility of relying on the ordinary meaning of these words (Ala. Br. 12) and claim to have discovered that when the Court said "debtor" and "creditor" it actually meant "originator" and "ultimate intended recipient." Ala. Br. 16. We would have thought that if the *Texas* court meant "originator," it would have used that word or would have remembered that it meant "originator" a few years later when it decided, in *Pennsylvania*, that Western Union (which clearly was *not* the "originator" of the money it held) was a "debtor" under the *Texas* rule.

B. The Court Should Not Start Down the Path of Developing a Federal Common Law of Escheat Priorities on a Case-By-Case Basis

The Texas group's primary justification for its view that the Court should ignore the ordinary meaning of the words "debtor" and "creditor" is its assertion that the Court should develop a federal common law in this area, case by case. Ala. Br. 17-18; Tex. Br. 21-24. This, despite the Court's repeated statement that it does *not* wish "'to devise new rules of law to apply to ever-developing new categories of facts.'" *Pennsylvania* v. *New York*, 407 U.S. at 215 (quoting *Texas* v. *New Jersey*, 379 U.S. at

679). The Intervenors, although a group of sovereign states, overlook that our federal system has, built into it, a presumption that state law will govern unless it has been displaced by federal law and a preference for the application of state law, even in federal-law regimes.

In a property regime—even one involving property acquired by a state through the exercise of its sovereign prerogatives—the presumption is firmly *against* the development and application of a federal common law. *See Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977).[17] In this case, also, state law creates the property rights at issue; federal law operates on top of the state regime only because conflicting state claims intruded on federal Due Process rights. *See* Del. Opening Br. 2-6, 33-37. The Intervenors respond that "fairness" requires development of new rules and new interpretations for this case. Tex. Br. 23; *see* Ala. Br. 18. But the purpose of the *Texas* rule was to provide a black-letter rule in an area where all litigation was necessarily within this Court's original jurisdiction, not to launch a series of *ad hoc* adjudications.

Even if the Texas Intervenors were correct that a federal common law should be developed, there is no reason why under federal common law a "debtor" should be an "originator" or a "former debtor," rather than just a "debtor." Any federal common law would build upon state law, inasmuch as state law is uniform and fully consistent with the natural reading of the *Texas* backup rule. Of course, the relevant state law is not the state

---

[17] The Court there held that the states' title to riparian lands that had reemerged from navigable streams "is not governed by a general federal law, but rather by the laws of the several States." 429 U.S. at 378. The Court explained that "state law should [be] applied unless there [is] present some other principle of federal law *requiring* state law to be displaced." 429 U.S. at 371 (emphasis supplied).

escheat statutes,[18] which the Alabama subgroup incorrectly claims that we rely on. The state escheat statutes do not define the private debtor/creditor relationship—the states' commercial and corporation laws do. *See* Del. Opening Br. 37-39. These commercial laws are, in all relevant respects, uniform throughout the nation. *See* Del. Opening Br. 38-39 & App. D at 86a-89a. The Arizona subgroup's argument that, as a court of equity, the Court should "pierce[] all fictions and disguises" of these laws, Tex. Br. 26, 26-32, is a rhetorical excess. Thousands of transactions a day are completed in reliance on the validity and predictability of U.C.C. § 8-207(1) and the relevant state general corporation laws. A corporation's ability to rely on its register of stockholders in discharging its obligations is not a "fiction" or "disguise." It is a necessary element of modern commerce.

C. The Holders of Unclaimed Property in This Case Are Always Debtors Who Owe Money to Unknown Creditors Under State Law

In their academic zeal to unearth "ambiguities" that do not exist in the real world, the Texas Intervenors have forgotten what this case is about: money held by nominees who do not know whom to pay. No one denies that the nominee holders of the unclaimed property owe the money to someone. Thus, at the outset, it is common ground that they must be "debtors" of someone. We demonstrate below: (1) the nominee holders do not owe the money to the issuers (unlike paying agents); (2) the nominee holders have the right to use the money in their businesses, and have superior title to it over all but their principals—the beneficial owners or their other nominees; (3) the issuers no longer owe any debt upon payment to

---

[18] The Alabama subgroup says that the details of these statutes can vary. Ala. Br. 11, 20-21. Indeed, that variability appears to have increased recently among the Alabama subgroup. *See* Del. Answering Br. 20-22 & nn.14-16 & Apps. B & C.

the holders of record; and (4) beneficial owners cannot receive distributions directly from issuers unless they are holders of record. Thus, the nominees are the only debtors, and their only creditors are unknown.[19]

1. The nominee holders are not the issuer's agents. They are stockholders of record or entities claiming under stockholders of record. As such, they have no duty to the issuer, and owe no debt to the issuer. They owe the money they receive to their principals—the beneficial owners or their other nominees. *See* Del. Opening Br. 37 & n.45. The DTC, for instance, considered—and rejected—a proposal that it serve as an agent for issuers. DTC Statement 3 (filed with the Special Master March 16, 1990). In these respects, holders of record stand in a funda-

[19] The Arizona subgroup makes the astounding suggestion that an "issuer as debtor" rule would make it easier for beneficial owners to make claims on the states for recovery of escheated distributions, since there would be only one state—the state of principal executive office of the issuer—that would have the power to escheat unclaimed distributions under the backup rule. Tex. Br. 32. Presumably, the notion is that the rule would save the beneficial owner the trouble of tracing his missing dividend to the entity that surrendered the funds to escheat and of finding out from it which state it surrendered the money to. There are numerous problems with the notion: the beneficial owner will not know whether the funds were escheated under the primary rule or the backup rule; he may not know what the "principal executive office" of his issuer is, if he does not collect 10-Ks and 10-Qs; but, most fundamentally, one cannot expect that any state will release funds that it has taken into custody to a claimant without the claimant's showing that the funds he claims had been actually escheated to that state. In order to prove his claim, the beneficial owner will have to go through the same chain of proof that he would have to go through under the present system. In point of fact, most claims on the states for customers are made by their brokers, and the brokers know to which state they escheated the funds. Finally, the record indicates that in most cases the customers are paid their distributions in full by their brokers even if their brokers have undergone an "underage" with respect to an incoming distribution payment. Shearer Dep. 154-56, 190-91; Cirrito Dep. 61-63; Principe Dep. 79-83. Thus, it is generally not customers who are out-of-pocket as a result of the sort of escheats, subject to the backup rule, involved in this case.

mentally different relationship to issuers than do paying agents. The record is full of evidence that paying agents, in contrast to shareholders of record, are viewed in the industry as being the exclusive agents of issuers.[20] There is no record evidence to the contrary.[21]

---

[20] *E.g.* Shearer Dep. 129-30; *see* DeCesare Dep. 38-40, 149-50 (the DTC considers paying agents and issuers as functional equivalents for purposes of distributions, and many issuers do not even use paying agents). The paying agent's contract is with the issuer. *See* Wellener Dep. 47; American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* § 10-3[3] at 318-19 (1986) (requiring company to enter into agreements with the paying agent, since a paying agent is "not a party to the indenture," but "a mere agent for the Company"). It is paid by the issuer for serving as the issuer's agent. Wellener Dep. 53. Its standard contracts require it to return unpaid funds to the issuer upon request, *id.* at 57-58; American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* § 10-3[5] at 322-23. The paying agents routinely return such funds upon request of the issuer, Wellener Dep. 63, 93, 130-31, 145-49, and issuers generally ask for the return of such funds. *Id.* at 148-49.

[21] Contrary to the Alabama subgroup's suggestion (Ala. Br. 22 n.25), section 317(b) of the Trust Indenture Act of 1939, Pub. L. No. 76-253, 53 Stat. 1149, 1173 (codified as amended at 15 U.S.C. § 77qqq(b) (Supp. II 1990)), does not make the paying agent an agent of the security holder. The federal law is an overlay, designed to protect security holders from dual insolvency of both the issuer and the paying agent. *See* American Bar Foundation, *Commentaries on Model Debenture Indenture Provisions* at 319-20. It does so by preventing the general creditors of the issuer *or* the paying agent from reaching funds that have reached the paying agent for payment to holders of record. That does not make the paying agent the agent of the security holder. The security holder is not qualified to give the paying agent instructions or otherwise control its actions. *See* n.20, *supra*. The paying agent is no more the "agent" of the security holder than a trustee of an express trust with full investment discretion is the agent of the trust's non-settlor beneficiaries. *See* William F. Fratcher, *Scott on Trusts* § 8 at 88 (4th ed. 1987) ("[a]n agent acts for, and on behalf of, his principal and subject to his control; a trustee as such is not subject to the control of his beneficiary").

Moreover, in cases of insolvency of a holder of record (for example, a broker-dealer), the beneficial owner has no recourse against

While an issuer's debt is discharged by payment to the shareholder of record, it is *not* discharged by payment to the paying agent. *See* Del. Opening Br. 38-40. As the American Bar Foundation's *Commentaries on Model Debenture Indenture Provisions* (1986) explains, "the obligation bargained for is that of the Company, and such obligation continues until satisfied . . . . [T]he deposit of funds with the Trustee or a paying agent . . . shall [not] operate to discharge the obligation of the Company in respect of such payment." *Id.* at 321.

Thus, in *Texas*, Sun Oil remained a "debtor" that could not locate its creditors. It appears from the Master's Report in that case that Sun Oil acted as its own paying agent, as many issuers do (*see* DeCesare Dep. 38-40). Report of the Special Master, *Texas* v. *New Jersey*, No. 13 Original, at 11 ¶ 6 (filed Dec. 2, 1963) ("[i]t is the practice of the Company to mail checks for cash dividends"). That might explain why the "paying agents" were "undiscussed" in *Texas*, as the Master in this case observed. Report 37. But since paying agents must return unclaimed moneys to the issuer (*see* p. 18 n.20, *supra*), even if there had been paying agents in *Texas*, they would have known exactly who their "creditor" was—Sun Oil.[22]

---

the issuer. Thus, when Congress enacted the Securities Investor Protection Act of 1970, it did not view retail customers as having recourse to issuers for the replacement of dividends or of improperly transferred or pledged securities in cases of broker-dealer insolvency. *See* H.R. Rep. No. 1613, 91st Cong., 2d Sess. 2-3, *reprinted in* 1970 U.S.C.C.A.N. 5254, 5255-56.

[22] The Alabama subgroup's statement that Delaware "concede[s]" that the banks holding Sun Oil's money in the *Texas* case were "debtors" (Ala. Br. 22) is therefore misleading. So long as Sun Oil's whereabouts were known—as Sun Oil's surely were to its banks—neither the *Texas* backup rule nor any escheat principles whatever applied to the banks vis-a-vis their creditor, Sun Oil. And so long as Sun Oil had not paid its "lost" shareholders of record, *it* was a "debtor" with either "unknown" or "lost" creditors. The Alabama subgroup's assertion that "state common law technicalities" (Ala.

2. The nominee holders have a right to use the funds in their businesses, good against all the world except the unknown creditor.[23] The Intervenors do not deny this. *See* Ala. Br. 6 n.9, 25 n.29. Nor do they deny that, absent a payment, made to someone who was erroneously recorded as a holder of record (giving rise to a claim of unjust enrichment), an issuer may not demand the return of unclaimed distributions from a holder of record. In contrast, as between a *paying agent* and an issuer, the issuer has a superior right to custody. *See* p. 18, *supra*; *see also Clarke* v. *New York Trust Co. (In re Associated Gas & Elec.)*, 137 F.2d 607, 608 (2d Cir. 1943) ("the Company could require its agent to return on demand any of the funds not previously disbursed"); *State* v. *Jefferson Lake Sulphur Co.*, 36 N.J. 577, 588, 178 A.2d 329, 334 (corporation has "naked right to custody" of the fund), *appeal dismissed & cert. denied*, 370 U.S. 158 (1962).

Br. 20) made Sun Oil a non-debtor is also not so. The Alabama subgroup points to a few cases holding that a corporation becomes a "trustee" for its shareholders upon segregation of funds to pay a previously declared dividend. Ala. Br. 19-20. These cases do not contradict the black-letter rule that the declaration of a dividend creates a debt. *See* Del. Opening Br. 38-39 & n.47. Indeed, most of them recite that rule and build on it by seeking to protect the shareholders' money from the reach of the corporation's general creditors. But even if Sun Oil's act of setting aside money to pay its debts created a trust, doing so did not make it any less a "debtor." One's debts are not discharged by setting money aside—in a trust or otherwise. They are only discharged by payment.

[23] *See* Del. Opening Br. 29-30. The Michigan group actually purports to make a distinction between "owner-unknown" creditors (which it says are not subject to the *Texas* rule) and "address-unknown" creditors (which it says *are* subject to the rule). Mich. Answering Br. 19-20. The Michigan group never explains how for escheat purposes having a name but no address differs in any material way from having neither a name nor an address. The touchstone of the *Texas* primary rule is a last known address; the absence of such an address requires application of the backup rule. Whether the holder has an owner's *name* does not affect the application of these rules or their rationale.

3. The issuer is discharged from its debt under state law upon payment to the holder of record. *See* Del. Opening Br. 37-39. This fundamental rule of corporation law is relied on by issuers every day. No corporation would pay distributions to nominee holders if the rule were otherwise. Its validity is supported by the record, by case law and commentary, and by routine commercial practice. *Id.* It is acknowledged by the Master. Report 25. The Texas group now tries to fudge away this simple fact, mainly by pointing (Tex. Br. 27; Ala. Br. 23) to cases in which, because of exceptional circumstances, corporations *refused* to pay holders of record without proof that they were *also* beneficial owners. *E.g.*, *Merrill Lynch Pierce Fenner & Smith, Inc.* v. *North Eur. Oil Royalty Trust*, 490 A.2d 558, 563 (Del. 1985); *Davis* v. *Fraser*, 307 N.Y. 433, 444-45, 121 N.E.2d 406, 412 (1954); *Keech* v. *Zenith Radio Corp.*, 276 A.2d 270, 273 (Del. Ch. 1971).

The Intervenors' argument suffers from an elementary logical fallacy; whether issuers are *required* to pay holders of record does not bear on the rule that allows them to discharge their liability by doing so.[24] This case is about situations where the issuer *has* paid the holders of record. The law is so clear, and the cases relied on by the Intervenors so obviously unhelpful, that the Alabama subgroup is actually driven to say that "commercial cases have nothing to do with the law of escheat." Ala. Br. 23. But commercial law creates the debt. Without it, there simply would be no unclaimed property to be escheated. And commercial law is in accord with the ordinary meaning of the word "debtor": when the holder submits the unclaimed property to the state, the issuer (1) has no

[24] So far as we know, there are no modern cases requiring an issuer to pay a dividend twice—once to the record holder and once to a beneficial owner. U.C.C. § 8-207(1) protects the issuer from having to do so. That this provision does not use the word "debtor" is hardly remarkable, since it covers the situation in which an issuer ceases to owe an obligation.

claim on the property, and (2) has already been discharged from the debt it used to owe.[25]

4. Beneficial owners cannot obtain dividends directly from issuers without becoming holders of record. They are not "creditors" of the issuers—only of their nominees. Despite all the Texas group's talk about "fundamental economic relationships," this fact will not go away. A beneficial owner with securities in nominee name simply cannot look to the issuer for payment once the issuer has paid the record holder.[26] Thus, the Texas group concedes, as they must, that the SEC communications rules and other materials they rely on do not "affect the payment of distributions." Tex. Br. 29, and all but concedes that section 7.23 of the Model Business Corporation Act has never been implemented as to dividends. Tex. Br. 28 n.18.

CONCLUSION

The existing rules are a "lawyer-like" solution to the conflicting claims of states to escheat intangible property. They provide an overall structure that is fair to all states. Rather than live within this overall structure, the Texas Intervenors ask this Court to begin tinkering with it, in the hope that the type of property at issue in this case can be disbursed "equally" among the states.[27]

---

[25] The case of Borden stock that was not properly reregistered, identified by the Arizona subgroup as demonstrating that on rare occasions issuers are not discharged of their debts because they have erroneously failed to pay the true record holder (Tex. Br. 25), is simply irrelevant. This case is about unclaimed property in the hands of nominee holders—not issuers.

[26] That is one reason why brokers' insolvencies led to a separately funded insurance system to protect brokers' customers. *See* pp. 18-19 n.21, *supra*.

[27] Recall, however, that in the absence of records—records no one has had a reason to maintain—New York will likely retain the lion's share of the moneys at issue in this case if the Intervenors prevail. *See* Del. Opening Br. 83 n.95.

If an exception from or change in the *Texas* rule is made in this case, it will not be in the same class as the proverbial "restricted rail ticket"—good for one day and train only—although that is what the Intervenors astoundingly suggest it can be. It will have widespread consequences, leading to a series of original jurisdiction cases in which further exceptions are sought and new "interpretations" are offered.

For the reasons stated herein and in our Opening Brief, there should be judgment against the Intervenors. Moreover, for the reasons stated in our prior filings, Delaware's Exceptions to the Report of the Special Master should be sustained in all other respects, and Delaware should have the relief against New York previously prayed for, and as set forth in the form of Decree attached as Appendix F to our Opening Brief.

Respectfully submitted,

CHARLES M. OBERLY, III
Attorney General
State of Delaware

J. PATRICK HURLEY, JR.
Deputy Attorney General
State of Delaware

DENNIS G. LYONS
Counsel of Record
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 872-6700

KENT A. YALOWITZ
399 Park Avenue
New York, New York 10022
(212) 715-1000
Attorneys for Plaintiff, State of Delaware

Of Counsel:
ARNOLD & PORTER
Washington, D.C., and
New York, New York

August 1992

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

NO. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

vs.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF THE STATE OF NEW YORK IN REPLY TO THE BRIEFS OF THE STATES OF TEXAS, *ET AL.*, AND ALABAMA, *ET AL.*, AND DELAWARE, AND BRIEF OF THE STATE OF NEW YORK

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

August 31, 1992

TABLE OF CONTENTS

PAGE

MOTION FOR LEAVE TO FILE BRIEF OF THE STATE OF NEW YORK IN REPLY TO THE BRIEFS OF THE STATES OF TEXAS, *ET AL.*, AND ALABAMA, *ET AL.*, AND DELAWARE iii

TABLE OF AUTHORITIES v

BRIEF OF THE STATE OF NEW YORK 1

SUMMARY OF ARGUMENT 1

ARGUMENT

POINT I -

THE COURT SHOULD ADHERE TO THE *TEXAS V. NEW JERSEY* RULES OF ESCHEAT PRIORITY IN THIS CASE 3

A. Texas And Alabama Propose Radical Departures From The *Texas* Rules . 3

B. Texas's And Alabama's Rationale For Departing From The *Texas* Rules Is Inconsistent With Precedent And Ease Of Administration 6

POINT II -

UNDER THE *TEXAS* PRIMARY RULE NEW YORK IS THE ONLY JURISDICTION ENTITLED TO ESCHEAT THE PROPERTY OWED TO CREDITORS WITH NEW YORK ADDRESSES ON THE DEBTORS' BOOKS AND RECORDS 8

PAGE

A. The Debtor Brokers' Books And Records Identify The Apparent Owners Of The Underlying Securities 8

B. The Apparent Owners Are The Creditor Brokers And Banks That Received Deliveries Of Nominee Float From The Debtor Brokers 11

C. Unclaimed Distributions Held By New York Debtor Brokers Can Be Traced to Apparent Owners With New York Trading Addresses In Virtually All Instances 13

CONCLUSION 17

NO. III ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

MOTION FOR LEAVE TO FILE BRIEF OF THE STATE OF NEW YORK IN REPLY TO THE BRIEFS OF THE STATES OF TEXAS, *ET AL.*, AND ALABAMA, *ET AL.*, AND DELAWARE

The State of New York, defendant, hereby respectfully moves for leave to file the annexed Reply Brief to the Briefs of the States of Texas, *et al.*, and Alabama, *et al.*, and the Brief of the State of Delaware in Response to the Briefs of the States of Michigan, *et al.*, and New York. The Court's scheduling Order, dated February 24, 1992, does not expressly provide for the filing of this Reply Brief.

The briefs filed pursuant to the Court's scheduling Order consist of the Exceptions and Briefs filed by the States of New York, Delaware, and Michigan, *et al.*, in opposition to the Special Master's Report, and the Reply Briefs filed by the States of Texas,

et al., and Alabama, *et al.*, in opposition to the Exceptions and in support of the Report. In addition, during the reply stage, New York, Delaware, and Michigan, *et al.*, filed briefs in response to each other's opening briefs. However, New York and Delaware, the States taking principal exception to the Special Master's Report, have not had the opportunity to respond to the States that fully support the Report, Texas, *et al.*, and Alabama, *et al.*

Permitting New York to file the annexed Reply Brief, therefore, follows the standard practice of according the right of reply to the petitioner or appellant in matters on appeal to the Court. As in any other matter, this Reply Brief will assist the Court in resolving the issues. In addition, New York's claim under the *Texas v. New Jersey* primary rule requires further explication because the discussions of New York's position in the Briefs of Texas, *et al.*, and Alabama, *et al.*, are fundamentally inaccurate. Delaware's arguments concerning the *Texas* primary rule, reserved principally for its Reply Brief, also necessitate a reply because they misconstrue New York's position as well. Finally, New York has filed this motion within the time period provided by the Court for the filing of reply briefs.

WHEREFORE, New York respectfully moves this Court that leave be granted to file the annexed Reply Brief.

Dated: New York, New York
August 31, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant

Robert A. Forte

ROBERT A. FORTE
Assistant Attorney General
of Counsel
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

TABLE OF AUTHORITIES

CASES:	PAGE
Pennsylvania v. New York, 407 U.S. 206 (1972) . .	*passim*
Texas v. New Jersey, 379 U.S. 674 (1965)	*passim*
STATE STATUTE:	
N.Y. Aband. Prop. Law (2 1/2 McKinney's Cons. Laws of N.Y. 1991), § 511	12

NO. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

BRIEF OF THE STATE OF NEW YORK IN REPLY TO THE BRIEFS OF THE STATES OF TEXAS, *ET AL.*, AND ALABAMA, *ET AL.*, AND DELAWARE

SUMMARY OF ARGUMENT

The States of Texas, *et al.* ("Texas") and Alabama, *et al.* ("Alabama") argue that the Court should revert to the "core principles" of *Texas v. New Jersey* - fairness and ease of administration - and conclude that all of the property involved in this case should escheat to the jurisdictions of the securities issuers. Texas Brief at 14-21; Alabama Brief at 11-18. This argument, also adopted by the Special Master, completely ignores the fact that in *Texas v. New Jersey*, the Court already formulated precise rules for fairly and efficiently resolving disputes among the States

over the escheat of abandoned intangibles. The rules are grounded in the debtor-creditor relationships established by state law, and were created for the express purpose of settling such disputes "*once and for all*." 379 U.S. at 677 (emphasis added). Accordingly, the crux of the Texas and Alabama position, that the Court should revisit *Texas v. New Jersey* and rewrite the rules of escheat priority it created there, is completely antithetical to its decision.

The changes in the *Texas* rules advocated by Texas and Alabama, moreover, fundamentally alter the basic principles of escheat law that have prevailed among the States and in the financial community ever since *Texas v. New Jersey* was decided over 27 years ago. Under the *Texas* rules of priority, the right to escheat abandoned intangibles belongs first to the jurisdiction of the *creditor* as shown by the *debtor's* books and records, and secondarily to the *debtor's* jurisdiction. Texas's and Alabama's focus on the relationship between the securities issuer and ultimate beneficial owner hypothecates a debtor-creditor relationship that simply does not exist in commercial law and is inconsistent with the States' own escheat laws and practices.

The Texas and Alabama proposal that the Court sever the *Texas* rules of priority from state commercial and escheat laws and announce substantive debtor-creditor rules can serve no conceivable federal purpose and will undermine the Court's concerns for fairness, certainty, and ease of administration. Additionally, the completely unorthodox definitions which Texas and Alabama ascribe to the terms "debtor" and "creditor" will necessarily raise endless disputes among the States over the meaning of these terms in other contexts, which this Court will be asked to resolve. Finally, the massive disruptions that must accompany Texas's and Alabama's proposals - the wholesale restructuring of the States' escheat practices and the complete redesign of the technological systems and compliance procedures of the institutions (brokerage firms, banks and depositories) that ensure the payment of securities distributions to their proper recipients - will dislodge the settled expectations that have evolved in the 27 years since *Texas v. New Jersey* was decided.

With regard to New York's right under the *Texas* primary rule to escheat the property held by New York debtor brokers, the evidentiary record supports all of the elements of New York's claim. The creditors can be identified from the debtor brokers' books and records and they are virtually all brokers and banks with New York trading addresses. New York seeks additional discovery, beyond that authorized by the Special Master, for the sole purpose of tracing a statistically valid sample of transactions which give rise to abandoned property to demonstrate that in most instances, the *actual* creditors of the property are brokers and banks with New York trading addresses on the debtor brokers' books and records. Under the *Texas* primary rule, New York is the only jurisdiction entitled to escheat the property owed to the creditors with New York addresses.

ARGUMENT

POINT I

THE COURT SHOULD ADHERE TO THE *TEXAS V. NEW JERSEY* RULES OF ESCHEAT PRIORITY IN THIS CASE

A. Texas And Alabama Propose Radical Departures From The *Texas* Rules

The conclusion that Texas and Alabama (and the Report of the Special Master) seek fundamental changes in the *Texas* rules is evident from their focus on the relationship between the issuer of a security and the ultimate beneficial owner, rather than the debtor - creditor relationships established by state law. The issuer - beneficial owner focus cannot be reconciled with the *Texas* rules, which look first to the jurisdiction of the *creditor* as shown by the *debtor's* books and records, and then to the *debtor's* jurisdiction. 379 U.S. at 682.

The securities issuer can not be the debtor of the property in this case for the axiomatic reason that the issuer's debt is discharged upon payment of a distribution to the record owner. This fundamental commercial law principle is contained in

caselaw and codified at U.C.C. § 8-207(1), which all States and the District of Columbia have adopted. *See* Exceptions of the State of New York to the Report of the Special Master at 60-62. The Special Master also recognized that the debtor-creditor relationships defined by U.C.C. § 8-207(1) are essential to the issuer's ability to pay distributions. *See* Report at 25.

The Texas and Alabama position, that the term "debtor" in the *Texas* rules should be applied to the securities issuer, is simply wrong. *See* Texas Brief at 16-32; Alabama Brief at 11-23. The *Texas* rules use the term "debtor" both to provide a focal point (the debtor's books and records) for identifying the creditor's jurisdiction under the primary rule, and for identifying the jurisdiction entitled to escheat under the backup rule. *Texas v. New Jersey*, 379 U.S. at 681, 682. Only state law, which defines the debtor-creditor relationships surrounding unclaimed distributions with certainty and finality, implements these goals. Texas's and Alabama's contention, that U.C.C. § 8-207(1) does not create uniformity because it only provides the issuer with an affirmative defense, is incorrect. *See* Texas Brief at 24-25; Alabama Brief at 18-23, 28-30. It is the universality of the commercial law rule, not exceptions in particular factual contexts, that has defined the States' escheat practices. Prior to Texas's intervention in this litigation, all States recognized that the term "debtor" in the *Texas* rules meant the record owner after the receipt of payment from the issuer, not the issuer.

Finally, the very notion that the Court used the term "debtor" to encompass the issuer *after its debt was discharged* destroys any semblance of certainty and predictability under the *Texas* rules. In *Texas v. New Jersey*, the Court referred to the issuer, Sun Oil, as the debtor and ignored its paying and transfer agents because their possession of Sun's property did not discharge its debts. The Court, thereby, dispelled any doubt that only the debt obligor is the debtor under the *Texas* rules. *Compare with* Alabama Brief at 19-22. Record owners, by contrast, are agents of the beneficial owners, not of the issuer. The issuer's payment of the distribution to the record owner, therefore, is entirely different and has the legal consequence of discharging the issuer's

debt. Ultimately, Texas and Alabama (and the Special Master) never justify using the term "debtor" to mean an entity *whose debt was discharged*. Their distortion of the common sense meaning of "debtor" in the context of the *Texas* rules will promote endless disputes over the identity of the debtors of other abandoned intangibles and leave the application of the *Texas* rules in turmoil.

It is equally clear that the Texas and Alabama focus on the beneficial owner as the creditor under the *Texas* primary rule violates both the rule's wording and intent. The primary rule gives the right to escheat in the first instance to the creditor's jurisdiction in recognition of the debt as the creditor's asset. 379 U.S. at 681. The rule also spells out the means of identifying the creditor's jurisdiction - the creditor's last known address *as shown by the debtor's books and records*. *Id*. All States through their escheat laws, as well as financial institutions holding unclaimed distributions as record owners, have uniformly identified the creditors of this property under the *Texas* primary rule as the apparent owners on the debtor's books and records, not the beneficial owners. *See* Exceptions of the State of New York to the Report of the Special Master at 59-60; Brief of *Amici* at 11.

The Texas and Alabama position, adopted by the Special Master, that the beneficial owners are the creditors of the property, undoes both the fairness and certainty that the Court built into the *Texas* primary rule. Since this position counsels against using the addresses of the financial institutions that are owed the property, it repudiates the last known address provision of the rule. More importantly, the fact that the debtor brokers' books and records never identify beneficial owners as such relegates all of the property to escheat under the *Texas* backup rule. This destroys the priority intended for the creditors' jurisdictions. Finally, the uniform brokerage practice of paying beneficial owners all of the distributions to which they are entitled, whether or not the brokers themselves received payment, completely eliminates any rationale for treating the beneficial owners as the creditors. *See* Exceptions of the State of New York to the Report of the Special Master at 30-31.

Texas's argument, that beneficial owners are not irrelevant to issuers because they are the actual owners of the underlying securities, misses the mark. *See* Texas Brief at 26-30. Of course issuers are concerned about the beneficial owners, and beneficial owners do have some rights with respect to issuers, such as a right to sue. However, beneficial owners have *no right* to payment of a distribution from the issuer. Texas does not dispute the essential fact that the issuer's responsibility for paying a distribution is fully satisfied upon payment to the record owner. The beneficial owner's right to payment lies only against its own broker. If anything, Texas's argument merely illustrates New York's position that beneficial ownership is an inappropriate focus under the *Texas* primary rule for the additional reason that the attributes of beneficial ownership are highly variable and are reflected in complex federal securities regulations that attempt to define it. *See* Exceptions of the State of New York to the Report of the Special Master at 5.

B. Texas's And Alabama's Rationale For Departing From The *Texas* Rules Is Inconsistent With Precedent And Ease Of Administration

Texas and Alabama are still rearguing *Pennsylvania v. New York*. They assert that their position is fairer because it will result in a wide dispersal of unclaimed distributions among the States.[1]

---

[1] This dispersal is actually accomplished by merging the Texas and Alabama definition of the issuer as the debtor with the Special Master's proposal that the Court change the locator under the *Texas* backup rule from state of incorporation to chief executive office. Contrary to the statements of Delaware, New York does not support the proposal that the location of the debtor's jurisdiction under the *Texas* backup rule be changed from domicile to chief executive office. *See* Brief For Delaware in Response to Exceptions of Michigan, *et al.*, and New York (July 1992), at 23-24. New York's position throughout this litigation has been that the *Texas* rules have proved workable in practice and have provided needed certainty and should, therefore, be adhered to strictly rather than be reconsidered on a case-by-case basis. Delaware appears to have confused New York's stated inability to argue against the Special Master's conclusion that chief executive office is a workable locator, with support for a change in the backup rule itself. *See* Exceptions of the State of New York to the Report of the Special Master at 73.

Texas Brief at 26; Alabama Brief at 23-28. In *Pennsylvania v. New York*, however, the States raised identical fairness arguments:

> *Texas v. New Jersey* was an exercise by the Supreme Court of its constitutional power to determine controversies between States. In the exercise of that power, the Court was guided by considerations of fairness and equity among the States, and the rules there declared were so declared to accomplish the desired fairness and equity.
>
> * * *
>
> To apply here the no address rule of *Texas v. New Jersey* without considering the purpose of the Court in that case to accomplish fairness and equity among the States, would be to defeat such purpose here.

Exceptions of Plaintiff, Commonwealth of Pennsylvania, to Report of the Special Master in *Pennsylvania v. New York*, filed Jan. 26, 1971, at 1-2.

In rejecting this argument, the Court expressed its preference for rules of certainty and finality over the States' parochial interests in dividing up the property:

> In other words, to vary the application of the *Texas* rule according to the adequacy of the debtor's records would require this Court to do precisely what we said should be avoided - that is, "to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts."

407 U.S. at 215 (quoting *Texas v. New Jersey*, 379 U.S. at 679).

Finally, Texas's and Alabama's contention that their issuer-debtor position is easy to administer is untenable. *See* Texas Brief at 30-32; Alabama Brief at 29-34. As demonstrated by *amici*, representing the entire spectrum of financial institutions in

the United States, the proposed new rules will cause the distribution of securities-related payments to become more complex and costly and ultimately less efficient. Brief of *Amici* at 13-20. In addition, *amici* demonstrate how the proposed new rules will make it more difficult for claimants to retrieve their property. *Compare* Brief of *Amici* at 22-23, *with* Texas Brief at 32 and Alabama Brief at 29 n.32.

POINT II

UNDER THE *TEXAS* PRIMARY RULE NEW YORK IS THE ONLY JURISDICTION ENTITLED TO ESCHEAT THE PROPERTY OWED TO CREDITORS WITH NEW YORK ADDRESSES ON THE DEBTORS' BOOKS AND RECORDS

A. The Debtor Brokers' Books And Records Identify The Apparent Owners Of The Underlying Securities

Texas and Alabama do not (and can not) dispute that the apparent owner of the security is identified on the debtor broker's books and records. The apparent owner is the creditor broker or bank that received delivery of the security from the debtor broker, and is the only entity entitled to make a claim for a distribution against the debtor broker. *See also* Brief of *Amici* at 11. The debtor broker necessarily maintains records of its sales and deliveries of securities, and it uses these records to verify the claims for distributions brought by the apparent owners. *Accord*, Report of the Special Master, Appendix B, Fact (62), at B-18. Texas and Alabama argue, however, that absent a claim for the distribution, the debtor broker is unable to determine the particular transaction that yielded it. Texas Brief at 36; Alabama Brief at 35, *see also* Delaware Brief at 33. The States' references to the evidentiary record do not support this argument.

The brokers testified only that it was impossible for them to identify the beneficial owner, or the holder of the security

on the record date, from their records. Shearer Dep. at 192-93; Principe Dep. at 102-05. The brokers' responses also incorporated the questioners' assumption that the creditor was the beneficial owner. *See, e.g.*, Cirrito Dep. at 93-94. Such testimony does not support the proposition that the brokers are unable to identify the apparent owners of unclaimed distributions. Moreover, since the brokers do not research *any* overage attributable to nominee float unless they receive a claim, their characterization of the property they remit to New York as owner unknown simply reflects the fact that no research is done, not that the apparent owner could not be identified with sufficient effort. *See* Shearer Dep. at 213-15; Principe Dep. at 222; Cirrito Dep. at 128. Even in the case of stock loans and pledges, the borrowing broker waits for a claim regardless of the fact that its records expressly identify the firm entitled to the distribution. Cirrito Dep. at 218.

The sole argument against New York's position distills into the hypothetical assumption that the debtor broker's records may reveal more than one delivery of identical share amounts of the same security, or that a particular overpayment may be the net result of a number of different transactions. Texas Brief 40-41; Delaware Brief at 24-27. Although these States simply assume that such situations exist and would be sufficiently prevalent to affect the identification of the apparent owner, New York has shown that this is not the case through its evidenced ability to identify the apparent owners of unclaimed distributions from the debtor brokers' books and records. *See* Affidavit of Robert Griffin, Director of Audits (May 5, 1988). And, indeed, although New York has never claimed that every transaction can be traced, the identification of the apparent owner is easier than Texas and Delaware suggest because the only relevant transactions are those that occurred close to a record date. New York's demonstrated ability to identify the apparent owners from the debtor brokers' books and records is simply uncontroverted on the record.[2]

---

[2] Texas and Alabama also contend that New York's position is contradicted by its statements in a prior State proceeding involving the brokerage firm

(Footnote continued)

Texas and Alabama also assert that identifying the first recipient of a physical certificate from a brokerage firm "fails to establish the necessary ownership interest" since "New York concedes that the first recipients of certificates from DTC and custodian banks are not the 'apparent owners.' " Alabama Brief at 39-40; *see also* Texas Brief at 36; Delaware Brief at 26, 33. As New York has pointed out several times, however, this argument is incorrect because of the fundamental difference between DTC's Cede float and the brokers' nominee float. *See* Exceptions of the State of New York to the Report of the Special Master at 25, 30; Reply of the State of New York to the Exceptions and Brief of the State of Delaware and States of Michigan, *et al.*, at 7-8. When a broker delivers out a certificate to settle a trade in the underlying security, the first recipient is the new owner of the security and, therefore, the apparent owner on the debtor broker's books and records.[3] By contrast, DTC delivers out certificates to its own participants to make physical deliveries to parties unknown to DTC. Custodian banks also deliver out certificates to their customers' brokers to settle trades in the underlying securities. In either instance, the first recipient is not the apparent owner and is not recognized by these entities as the creditor of an unclaimed distribution. *See, e.g.*, DTC Statement at 17.

---

of Paine Webber (citing the "Paine Webber" stipulation), and by sections of New York's Abandoned Property Law. Texas Brief at 37; Alabama Brief at 35-36. These arguments, although presented to the Special Master, were never credited by him, indicating their lack of probative value regarding New York's primary rule claim. In any event, neither the stipulation, nor the statute which predates *Texas v. New Jersey*, disproves New York's ability to identify the apparent owners of unclaimed distributions from the debtor brokers' books and records. *See also* New York's Brief in Opposition to the Motions of the Plaintiff-Intervenor States (Dec. 18, 1990), at 56-59.

[3] Brokerage firms also deliver out certificates to other brokers and to banks on stock loans and pledges. In these situations, however, the delivering broker's customer still owns the certificate and the broker's records reflect the fact that the recipient broker or bank is not the owner. Deposition Transcript of Robert Shearer, Merrill Lynch, Pierce, Fenner & Smith, Inc., 293-95 (July 19-20, 1990) ("Shearer Dep."); Deposition Transcript of Joseph Principe, John Hancock Clearing Corp. (Tucker Anthony, Inc.), 78, 100-01, 168 (July 25, 1990) ("Principe Dep."); Deposition Transcript of John Cirrito, Prudential-Bache Securities, Inc., 218 (July 26, 1990) ("Cirrito Dep.").

B. The Apparent Owners Are The Creditor Brokers And Banks That Received Deliveries Of Nominee Float From The Debtor Brokers

Texas and Alabama contend that New York's ability to identify the apparent owners of nominee float from the debtor brokers' books and records is not sufficient to justify its claim under the *Texas* primary rule because the nominee float delivered to the apparent owners is not the only source of unclaimed distributions. Texas Brief at 38-39; Alabama Brief at 41-43; *see also* Delaware Brief at 27, 29-31. These States assert that abandoned property is also caused by (1) errors (including missed transfers[4] and out-of-balance conditions with issuers' paying agents and DTC), in which case the creditor would be unknown; and (2) the brokers' practice of delivering physical certificates to customers registered in the brokers' street name, in which case the creditor would be known but would not necessarily be a New York-addressed entity or individual. *Id.* The States contend, therefore, that New York is not entitled to the property held by debtor brokers in New York. The fallacy of the argument is that the evidentiary record contradicts the premise that there are significant causes of unclaimed property other than nominee float.

(1) Errors. The various references to the evidentiary record cited by Texas, Alabama and Delaware for the proposition that errors are a recognized cause of unclaimed property merely establish that errors contribute to initial overages. *See, e.g.*, Shearer Dep. at 192-96, 420-21; Principe Dep. at 97-98; Cirrito Dep. at 224-25. *See also* DTC's discussion of the possible causes of initial overages (DeCesare Dep. at 87-91, 120-21, 133, 138, 195-97).[5] The salient

---

[4] Missed transfers are not "errors." They are delays in the re-registration of physical certificates resulting in initial overages because a record date has been missed. These overages are not significant for escheat purposes because they are routinely tracked by the record owner and new owner. An example of a situation in which a missed transfer can lead to an initial overage, but not abandoned property, is discussed at II.B(2), *post*.

[5] Deposition Transcript of Raymond DeCesare, The Depository Trust Company ("DTC") (May 15-16, 1990).

difference between *initial* overages and unclaimed property is that the overage represents a raw surplus figure that arises after the broker has received a distribution and credited its customers' accounts, whereas unclaimed property is the remainder of that overage at the end of New York's three-year dormancy period. *See* N.Y. Aband. Prop. Law § 511. At the end of three years, when the brokers escheat the property to New York, it is their opinion that the principal cause of the escheated property is the floating certificate or nominee float. Cirrito Dep. at 128-29. This is in accord with DTC's equation of its abandoned property holdings with Cede float. DeCesare Dep. at 353; DTC Statement at 15-18.

Texas and Alabama argue, in essence, that because the brokers can not discount the possibility that errors remain undetected at the time they escheat their abandoned property holdings to New York, all of the property should be deemed owner-unknown. Texas Brief at 39; Alabama Brief at 42-43; *see also* Delaware Brief at 29. This example of the tail-wagging-the-dog illogic defeats the very purpose of the *Texas* primary rule by requiring that *all* of the brokers' property escheat under the backup rule based upon the speculation that it may be appropriate for a small percentage of it to escheat in that manner.

In addition, the States' argument ignores the fact that to the extent errors are involved in creating initial overages, their effect on abandoned property is insignificant. The evidentiary record establishes that all financial institutions engage in intensive efforts to correct errors and resolve out-of-balance conditions. *See, e.g.*, Shearer Dep. at 196-97 (describing the steps that are taken to make sure that the distributions received by Merrill Lynch and paid to its customers are "absolutely correct"); *see also* Brief of *Amici* at 20-21 (financial institutions have developed procedures and computer systems, comprising legal, accounting and technological components, designed to ensure that their customers are paid all of the distributions to which they are entitled). The brokers' customers also initiate inquiries if they fail to receive a distribution, resulting in corrective measures by their brokers. Shearer Dep. at 226-27. Finally, out-of-balance conditions are unlikely to go undetected because

they are also the subject of research by the paying agent and DTC. If the agent or DTC has overpaid a record owner, it will receive a claim from the record owner it has correspondingly underpaid. DeCesare Dep. at 120-22. The efficiency of the industry's error corrective procedures is amply demonstrated by the fact that DTC has never had an unresolved overage in a certificateless issue after three years. DTC Statement at 15. It is also substantiated by the fact that only 2.6% of the claims paid by New York between 1985 and 1989 were to individual claimants.

(2) Deliveries to customers of certificates registered in the broker's street name. Texas's and Delaware's reliance on these deliveries to refute New York's claim under the *Texas* primary rule is equally misconceived because such deliveries do not generate abandoned property. The deliveries are almost exclusively confined to institutional customers and, indeed, would be a "terrible practice" in any other context. Principe Dep. at 65-66; *see also* Shearer Dep. at 34; Cirrito Dep. at 128-29. The customer obtains the certificates for the purpose of re-registering them into its name or the street name of its custodian bank. *Id.*; *see also* Scott Dep. at 80. If the re-registration misses a record date and the distribution is paid to the broker, there is little if any possibility that it will be escheated. Custodian banks routinely make claims for distributions on missed transfers (*see* Scott Dep. at 138-39), and it is highly unlikely that an institutional customer or any other customer expecting a distribution would not.

C. Unclaimed Distributions Held By New York Debtor Brokers Can Be Traced to Apparent Owners With New York Trading Addresses In Virtually All Instances

The States' last challenge to New York's claim under the *Texas* primary rule centers around the use of trading addresses to identify the apparent owners of unclaimed distributions from the debtor brokers' books and records. They assert that this approach is a *post hoc* effort to establish an identity for creditors that are in fact unknown. Texas Brief at 42; Alabama Brief at 44-45; Delaware Brief at 36-37. They also assert that the use of trading

addresses would only create a presumption as to the creditors' identities, not establish their actual identities as required by the *Texas* primary rule. *Id.* These arguments are based on misunderstandings of New York's position.

The claim that New York's use of trading addresses is a *post hoc* defense rests upon the initial misconception that the creditors of this property are the beneficial owners, or record date holders who obtained the securities as the result of a more distant transaction unrelated to the debtors and creditors of the abandoned property. *See, e.g.*, Delaware Brief at 34-35. As New York has demonstrated, however, the creditors of unclaimed distributions are the apparent owners - the brokers and banks that first received deliveries of nominee float. Accordingly, the fact that the debtor brokers' books and records do not identify the beneficial owners or record date holders has no bearing on the validity of the trading address as the means of identifying the creditors of the property.

The States' contention that the trading address itself is an artifice is equally meritless. Texas Brief at 42; Alabama Brief at 44-45; Delaware Brief at 27. A New York trading address establishes the actual presence of the creditor broker or bank in New York. The trading address designates the place from which the creditor broker or bank conducts its securities trades and where it maintains its record-keeping facilities. It is, therefore, the only relevant address for locating the creditors under the *Texas* primary rule. Delaware's contention that a New York trading address is really a New York City address, and that this somehow renders the address unsuitable for locating the creditors under the *Texas* primary rule, is nonsense. *See* Delaware Brief at 27. The fact that creditor brokers and banks have New York City addresses demonstrates why New York is entitled to escheat their abandoned property holdings. Delaware's claim is also not advanced by the fact that a broker such as Tucker Anthony is headquartered in another State but conducts securities trades in New York through a New York correspondent brokerage or clearing firm. *See* Documents Lodged With The Court (May 9, 1988), Tab C, at 196-97 (defining "correspondent" or "clearing" firm). In this situation, the New York correspondent firm is the creditor

because it is the apparent owner on the debtor broker's books and records, no different in position with respect to the debtor broker than a broker acting directly on behalf of a customer. Accordingly, a correspondent firm with a New York trading address establishes the creditor's presence in New York.

The States' last assertion is that New York's use of trading addresses to locate the creditors of unclaimed distributions can only demonstrate that brokers and banks in New York are owed the property "in general," thereby failing to satisfy the *Texas* primary rule's requirement of particularity. Texas Brief at 42; Alabama Brief at 44-45; Delaware Brief at 33-35. This argument is a fundamental distortion of New York's position. New York's claim under the *Texas* primary rule is based on the fact that the *actual* creditors of *particular* unclaimed distributions can be identified from the debtor brokers' books and records. New York seeks further discovery for the sole purpose of tracing a sufficient number of transactions to demonstrate that in most instances, the *actual* creditors of the property on the debtor brokers' books and records are creditor brokers and banks with New York trading addresses.[6]

The States' contention, that New York's claim is generalized rather than specific because New York ascribes New York trading addresses to "virtually all" rather than "all" creditor brokers and

---

[6] Although it is argued that New York should have utilized the prior depositions of the brokerage firms to establish the brokers' ability to trace transactions and identify the apparent owners of unclaimed distributions, this argument is untenable. First, this line of inquiry was expressly excluded from the scope of discovery. The parties were not permitted, "at this juncture in the proceedings at any rate," to conduct discovery "detailing the address record-keeping practices in the industry." Litigation Management Order No. 1 (Oct. 18, 1989), ¶ 1. In addition, since the brokers testified that they do not (rather than can not) trace overages due to nominee float unless a claim is made, the actual tracing process could not have been explored through their testimony. Finally, even if New York had successfully undertaken this line of questioning, it would not have affected the outcome of the Special Master's Report since the Master was only concerned with identifying the beneficial owners: "It should be made clear at this juncture, however, that in applying the primary rule, the last-known-address of the beneficial owners, not other intermediaries, will control." Report at 67.

banks, is incorrect. *See, e.g.*, Delaware Brief at 33-35. This suggests only that a small percentage of the property may be owed to a few out-of-state brokers with out-of-state trading addresses who trade with New York debtor brokers. The property that is owed elsewhere is payable elsewhere, and this does not refute New York's claim to the property owed to New York creditors. The fact that virtually all of the creditor brokers and banks entitled to the property in question have New York trading addresses simply demonstrates that most of the property is escheatable to New York.

Finally, Delaware's contention that the trading activities of regional and small brokerage firms trading outside of New York are relevant to the property claimed by New York is totally misplaced. *See* Delaware Brief at 37.[7] These firms, trading in other States, report their unclaimed distributions to those States based upon the same understanding of the debtors and creditors of the property as that held by New York. New York's claim extends only to the property owed to New York creditors. Since New York is the only State entitled to escheat this property under the *Texas* primary rule, it should be permitted to conduct further discovery to establish the actual identities of the New York-addressed creditors from the debtor brokers' books and records.

---

[7] Delaware's reference to the Brief of *Amici* to support its contention that regional and small brokers are owed property escheated by New York is not supportable. *Amici*'s discussion of such firms was solely in the context of refuting the Special Master's conclusion that it would not be administratively difficult for these firms to report their own abandoned property holdings to the jurisdictions of the issuers under Texas's and Alabama's theory. *See* Brief of *Amici* at 14.

CONCLUSION

THE INTERVENORS' COMPLAINTS SHOULD BE DISMISSED AND THE MATTER REMANDED FOR FURTHER DISCOVERY

Dated: New York, New York
August 31, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
of Counsel

(52)

No. 111 Original

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

On the Report of the Special Master

OPPOSITION AND REPLY BRIEF FOR THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA IN RESPONSE TO MOTION OF THE STATE OF DELAWARE FOR LEAVE TO FILE BRIEF IN REPLY TO THE REPLY BRIEFS OF THE PLAINTIFF-INTERVENOR STATES AND ACCOMPANYING BRIEF IN REPLY

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney General
YEORYIOS C. APALLAS
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for Plaintiff-Intervenor State of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

August 31, 1992

[Attorneys General of Alabama, *et al.* Listed Inside]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

18 pp

ATTORNEYS GENERAL OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, *ET AL.*

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

CHRIS GORMAN
Attorney General of Kentucky
700 Capitol Avenue
Capitol Building, Suite 116
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN112
Trenton, New Jersey 08625
(609) 292-4925

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARIO J. PALUMBO
Attorney General of West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 348-2021

MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

JOHN P. ARNOLD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301-
6397
(603) 271-3658

NICHOLAS J. SPAETH
Attorney General of
North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General of Washington
Highways-Licenses Building, •
PB71
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 111 Original

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

v.

STATE OF NEW YORK,
Defendant.

On the Report of the Special Master

OPPOSITION OF THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA TO MOTION OF THE STATE OF DELAWARE FOR LEAVE TO FILE BRIEF IN REPLY TO THE REPLY BRIEFS OF THE PLAINTIFF-INTERVENOR STATES

The thirty-one undersigned States oppose the Motion of the State of Delaware for leave to file a surrebuttal brief in reply to the responsive briefs filed by the undersigned and by the States of Texas, *et al.* on July 27, 1992. The issues in this case have been exhaustively argued

pursuant to this Court's Order of February 24, 1992. There is no allowance in that Order or in this Court's rules for Delaware to initiate yet another round of briefing.

This Court's February 24 Order provided that each party in this proceeding may file Exceptions to the Report of the Special Master and supporting briefs, and Replies thereto. Pursuant to that Order,[1] Delaware submitted Exceptions and a supporting brief that collectively exceeded 90 pages (excluding appendix), and a 39-page Reply brief (excluding appendix). Delaware now requests that it be permitted to file yet another brief with this Court, on the ground that the Reply briefs filed by the undersigned States and by Texas, *et al.* "set out [their] primary case in chief."

In fact, as expressly stated in the Statement of the Plaintiff-Intervenor States of Alabama, *et al.* and the State of California in Support of the Report of the Special Master, it is the Report of the Special Master that sets forth our "primary case in chief" and that of Texas, *et al.* The State of Delaware had ample opportunity and extended time to dispute the Report, and indeed fully availed itself of that opportunity by filing an 86-page brief arguing profusely its several exceptions. The briefs thereafter filed by the undersigned and by Texas, *et al.* in reply undertook only to respond to Delaware's and New York's arguments.

The customary sequence of Report-Exceptions-Replies was obviously calculated to ensure that all parties had the fullest opportunity to address the several issues in the case. No new issues were introduced in the Reply briefs by the undersigned States and by Texas, *et al.* such as would warrant surrebuttal by Delaware. To the contrary, the sole purpose for the instant Motion is to pro-

---

[1] The Clerk of this Court subsequently revised the dates on which the briefs authorized by the Order were due.

vide Delaware yet another "bite at the apple," a chance to reiterate its earlier arguments in different rhetorical wrapping. Such a purpose offers no legitimate excuse for further briefing.

If the Court disagrees and is inclined to grant Delaware's Motion, the undersigned States respectfully request that they be given the opportunity to answer the brief attached to Delaware's Motion through the brief attached hereto. Fundamental fairness requires as much. If Delaware is to be allowed three opportunities to attack the conclusions of the Special Master's Report, surely plaintiff-intervenors should be afforded at least two opportunities to respond to those attacks in defense of the Report.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney General
YEORYIOS C. APALLAS
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for Plaintiff-Intervenor State of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

August 31, 1992

TABLE OF AUTHORITIES

Cases: Page

California v. *Texas*, 437 U.S. 601 (1978) 2
Colorado v. *New Mexico*, 459 U.S. 176 (1982) 2
Connecticut v. *Massachusetts*, 282 U.S. 660 (1931) .. 2
Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) 8-9
Moragne v. *State Marine Lines, Inc.*, 398 U.S. 375 (1970) 9
Oregon ex rel. State Land Bd. v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) 2, 3
Patterson v. *McLean Credit Union*, 491 U.S. 164 (1989) 5
Pennsylvania v. *New York*, 407 U.S. 206 (1972) 7, 8
Texas v. *New Jersey*, 379 U.S. 678 (1965) ..... *passim*
United States v. *Scott*, 437 U.S. 82 (1978) 5

Statutes:

Federal Tax Lien Act of 1966, I.R.C. § 6323 6
Trust Indenture Act of 1939, 15 U.S.C. §§ 77aaa *et seq.* 3

Uniform Commercial Code:

U.C.C. § 9-103 6

REPLY BRIEF FOR THE PLAINTIFF-INTERVENOR STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA, AND THE STATE OF CALIFORNIA IN RESPONSE TO BRIEF OF THE STATE OF DELAWARE IN REPLY TO THE REPLY BRIEFS OF THE PLAINTIFF-INTERVENOR STATES

This consolidated brief is submitted on behalf of thirty-one States in response to the further brief Delaware has sought leave to file with respect to the Report of the Special Master.[1] Although styled as a reply, Delaware's latest brief for the most part repeats contentions from its opening brief. Indeed, in crucial respects Delaware does not even respond to our arguments, but elects instead to reemphasize the three false premises on which it has rested its case. We accordingly limit our response to these three errors.

1. *The Backup Rule and Stare Decisis.* Delaware continues to assert that the doctrine of *stare decisis* requires this Court to resolve in Delaware's favor the central issue in this case—whether the State of the issuer or the State of the conduit intermediary is entitled to custody of unclaimed securities distributions subject to the backup rule of *Texas* v. *New Jersey*, 379 U.S. 678 (1965). *See generally* Del. Reply Br. 1-5. Nowhere does *Texas* v. *New Jersey* definitively dispose of that

---

[1] Brief For Plaintiff, State Of Delaware, In Reply To The Briefs Of The Texas Group Intervenors, dated August 1992 ("Del. Reply Br.").

question, although both the parties and the Special Master derive support for their positions from that decision. Moreover, no one is suggesting that the backup rule fashioned by this Court in *Texas* v. *New Jersey* be overruled; at issue, instead, is its application in the context of securities distributions that become unclaimed in the course of transmission across the modern multiparty securities distribution network. To assert boldly "*stare decisis*" in such circumstances, as Delaware does, offers no helpful guidance.

2. *Original Jurisdiction and Federal Common Law.* The core premise of Delaware's backup rule argument, on the merits, remains its unsupported assertion that this Court intended *sub silentio* in *Texas* v. *New Jersey* to have all future escheat cases turn upon the vagaries of state debtor-creditor laws. We demonstrated at length in our initial response that this could not have been the Court's intention in formulating federal rules of escheat priority in that case. Ala. Br. 13-18. Delaware conveniently ignores our earlier discussion, and, without so much as a passing reference to, let alone any discussion of, the original jurisdiction decisions we cited,[2] flatly misstates that there exists "a presumption that state law will govern" in original jurisdiction cases such as this. Del. Reply Br. 15. In support of this proposition, Delaware offers only the non-original jurisdiction case of *Oregon ex rel. State Land Bd.* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). That case concerned a private party's assertion of rights against a State, not rights claimed by one State against one or more other States. Moreover, the Court reaffirmed in its decision

---

[2] Ala. Br. 17 (citing *Colorado* v. *New Mexico*, 459 U.S. 176, 184 (1982); *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669-71 (1931); *California* v. *Texas*, 437 U.S. 601, 613 (1978) (Stewart, J., concurring)).

that "in the exercise of its original jurisdiction over suits *between States*, [the Court] has necessarily developed a body of *federal common law*" to resolve the rights of States *inter se*. *Id.* at 375 (emphasis supplied).

Delaware yet again devotes the bulk of its argument on the backup rule to defining the federal common law in terms of state laws dealing with creditors' rights. Although Delaware presses this approach on the theory that using state debtor-creditor labels would solve all problems in applying the backup rule to unclaimed securities distributions, Delaware's analysis is far more cumbersome than it pretends. Indeed, the complications and contradictions introduced under Delaware's state-law "solution" largely explain why this Court has refused to allow its federal common law rules in original jurisdiction cases to be confined by state-law concepts.

The point is brought home clearly with Delaware's attempt to reconcile state-law concepts of "debtor" and "trustee." Del. Reply Br. 19-20 n.22. As explained in our initial response to Delaware's Exceptions (Ala. Br. 19-20), this Court's reference to Sun Oil as a "debtor" in *Texas* v. *New Jersey* was descriptive only, because, among other reasons, Sun Oil was in fact a "trustee" (and *not* a "debtor") under state law when it established a special account for payment of cash dividends. Delaware casually dismisses the state "trustee" label as of no significance, arguing that the Court can nonetheless consider a "trustee" to be a "debtor" because it owes someone (the owner) something. Del. Reply Br. 19-20 n.22. In the same breath, however, Delaware asserts (*id.* 18 & n.21) that paying agents should not be considered "debtors" even when they are "trustees" under the Trust Indenture Act of 1939 and, like an issuer "trustee," may be said to owe someone (the owner) something. Ala. Br. 22 n.25. Such inconsistencies unavoidably come with an

analysis grounded on state-law definitions, as opposed to a developed body of federal common law.

Delaware's other arguments likewise expose the clumsiness of its approach. Even though an issuer (when not a "trustee") remains a "debtor" under state law until it raises and establishes an affirmative defense of "good faith" payment, *see* Ala. Br. 22-23, 30 (and cases cited), Delaware urges the Court to find that an issuer ceases to be a "debtor" as soon as it passes a distribution to an intermediary. Del. Reply Br. 21-22. Delaware also states that it is irrelevant that an issuer may be a "debtor" under a state escheat statute because the Court did not intend to incorporate these particular state-law definitions of "debtor" into its priority rules. *Id.* 15-16. It is only by such picking and choosing among potential state-law "debtors" that Delaware is able to arrive at its strained conclusion that the State of a conduit intermediary should have equitable priority under the federal common law rules of *Texas* v. *New Jersey*. In the end, Delaware is forced to choose among potential state-law "debtors" based upon their attributes. The result-oriented attributes that Delaware selects, however, unlike those relied on by the Special Master, are divorced from the federal policies underlying the Court's escheat rules. *See* Ala. Br. 23-34.

3. *Definition of an Issuer's Location.* Delaware again invokes *stare decisis* as a reason to reject the Special Master's proposed modification in the backup rule's use of "State of incorporation" as a proxy for an issuer's location. To be sure, adoption of this recommendation—unlike the Master's separate conclusion that the State of the issuer has priority—would result in an acknowledged change in one aspect of existing law.

Even so, *stare decisis* does not paralyze this Court from exercising its common law powers to modify an element of one of its own equitable rules when that element has become increasingly inequitable and the justi-

fication for it—the administrative infeasibility of any alternatives—no longer exists. Indeed, the doctrine, which is in no case an absolute bar to revisiting (and, where deemed appropriate, overturning) Supreme Court precedent, *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172 (1989), is accorded its most unyielding application only with respect to precedents interpreting acts of Congress. *Id.* When constitutional questions are involved, *stare decisis* traditionally receives less judicial respect. *United States* v. *Scott*, 437 U.S. 82, 101 (1978). The doctrine logically should carry even less force in the present context where the Court, in the exercise of its original jurisdiction, is called upon to resolve, *ab initio*, disputes between and among the several States under equitable principles of federal common law.

Delaware's much more wooden view is particularly unconvincing in the present circumstances. It rests upon a misunderstanding of *Texas* v. *New Jersey*, a total disregard for the dramatic technological developments in the securities industry during the past quarter century, and unsubstantiated hyperbole about the interests that would be affected by such a change.

First, Delaware erroneously states that this Court selected "State of incorporation" as a proxy for location in *Texas* v. *New Jersey* because the Court found that "the state of incorporation gives the benefit of its laws and the expertise of its judiciary to the corporations it incorporates." Del. Reply Br. 13. To the contrary, the Court discounted "State of incorporation" as a "minor factor" to be considered, 379 U.S. at 680, and fell back upon it as a proxy for location only because the Court believed that a "principal place of business" approach would be impracticable and that a "State of incorporation" proxy at least possessed "the obvious virtues of clarity and ease of application." *Id.* The Court further concluded that the State in which Sun Oil was headquartered, Pennsylvania, had a "more persuasive" claim

than Sun Oil's place of incorporation (New Jersey) since Pennsylvania was "probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence." *Id.* This conclusion makes irrelevant Delaware's rhetorical question whether "Texaco has found oil in Westchester County, New York, or Mobil in Fairfax County, Virginia (where their principal executive offices are recorded)." Del. Reply Br. 11. Pennsylvania had the superior equitable claim even though Sun Oil obviously had not discovered oil in Philadelphia, nor apparently elsewhere in Pennsylvania.

Second, Delaware's insistence (Del. Reply Br. 5-6) that there have been no developments since *Texas* v. *New Jersey* to justify the Special Master's proposal is nonsense. The fact that SEC forms containing "principal executive offices" information existed in 1965 (*id.* 9) is irrelevant. Holders of unclaimed securities distributions did not have at their disposal in 1965, as they do today, a variety of computer databases through which they can readily access such information. *See* Ala. Br. 50 & n.75, 52.[3] Since the "State of incorporation" proxy now operates in "quite unfair" ways (Report 47)—Delaware's halfhearted arguments to the contrary notwithstanding[4]

---

[3] Delaware erroneously asserts (Del. Reply Br. 6-7) that experience under U.C.C. § 9-103 and the Federal Tax Lien Act foretells difficulties with a "principal executive offices" definition. Unlike those statutory definitions, however, the Special Master's "principal executive offices" definition looks to a definitive headquarters location—the "principal executive offices" identified by companies on their SEC filings (and which are accessible through computer databases).

[4] The only new argument Delaware makes is that the amounts involved in this case (and in the future with respect to unclaimed securities distributions) are insufficiently large to justify a refinement in the locational element of the backup rule. Del. Reply Br. 2-3 & n.4. To make this case, Delaware breaks down into average annual figures ($8.2 million per year) the total estimated amount New York seized from Delaware-incorporated brokerage firms from

—refining this proxy to take these developments into account would in fact far better serve the core holding of *Texas* v. *New Jersey*: that unclaimed intangible property should be apportioned among the States in accordance with principles of fairness and ease of administration.

Third, Delaware's argument—clothed yet again in the garb of *stare decisis* (Del. Reply Br. 3)—that the Court should not modify the locational definition because the Court in 1972, in *Pennsylvania* v. *New York*, 407 U.S. 206, refused to allow case-by-case litigation over exceptions to the backup rule itself misses the point.[5] Here, the specter of future case-by-case litigation is unwarranted. Delaware's contention that there exist "significant" "possibilities for dispute" as to the "principal executive offices" of companies both within and without the securities context, *e.g.*, Del. Reply Br. 4-5, 8 & n.11, is unfounded,[6] as is its assertion that changing the defi-

---

1972 through 1988. But the total amount of these seizures remains $139 million, and recent annual figures are three times these earlier amounts. From 1986 through 1988, New York seized an average of $24 million annually from Delaware brokers. *See* Defendant's Response to Plaintiff State of Delaware's First Interrogatories Directed to Defendant, Schedule I (March 1989).

[5] So, too, does Delaware's argument (Del. Reply Br. 14-15) that granting escheat priority to the State of the issuer conflicts with the Court's disinclination in *Pennsylvania* v. *New York* to allow exceptions to the backup rule. Recognizing that the backup rule logically gives priority to the issuer's State, rather than the State of the conduit intermediary, involves construing and applying the backup rule (not creating an exception to it).

[6] In the cited instances of a mutual fund or a collateralized obligation trust, *see id.* 8 n.11, the solution to the hypothetical problem Delaware poses is simple: the relevant principal executive office is that of the fund or trust, which is the issuer of the security. Delaware does not dispute that in other, non-securities cases—which are not before the Court—the holder would also be either the originator or the only known party to the transaction, and would certainly know the State of its own principal executive offices. *See* Ala.

nition of the location of issuers would upset the reliance interests of private parties.[7]

It is, moreover, particularly inappropriate to discuss *Pennsylvania* v. *New York* in *stare decisis* terms since Congress subsequently altered the result announced in that case—and in ways favoring our position, not that of Delaware. Ala. Br. 27, 53-54 n.81. Delaware's contention (Del. Reply Br. 3) that this Court should decide this case inconsistently with that legislation, which rejects "State of incorporation" as a proxy for location, because that statute specifically applies only to money orders and traveler's checks, has an especially hollow ring. As we have already shown (Ala. Br. 27, 53 n.81)—again without any reply—the Court traditionally takes guidance in federal common law cases from federal statutes even when they do not speak directly to the question before the Court. *E.g.*, *Mobil Oil Corp.* v. *Higginbotham*, 436

Br. 53 n.80. Delaware merely questions whether the holder "can conclusively decide this issue." Del. Reply Br. 8 n.10. Even in the rare case in which there could be a genuine factual dispute, the holder's own recorded description of where its principal executive offices are located would be determinative under the Court's priority rules (just as its records are determinative under the primary rule). Furthermore, Delaware ignores our point that, in any event, a holder's good faith payment to one State protects it from liability to any other State. *See* Ala. Br. 51 & n.77.

[7] Delaware provides no specific examples for this assertion, and merely cites in passing the SIA *Amici Brief*. Del. Reply Br. 1. The practice of SIA member companies and other intermediary *amici*, however, has been to turn over owner-unknown unclaimed securities distributions to New York irrespective of where the holder (much less any issuer) is incorporated. We have shown at length (without response from Delaware) that the *amici*'s alleged concerns are unwarranted. Ala. Br. 31-34. Like the argument that the Special Master's construction of the backup rule creates undue reporting burdens—even though the intermediary *amici* currently remit unclaimed securities distributions under the primary rule to all fifty States—Delaware's dire warnings about reliance interests and administrative confusion are simply not borne out by the record, as the Master correctly concluded. *See* Report at 42-50.

U.S. 618, 624-25 (1978). Certainly, the fact that Congress has not spoken directly to the issue presented here does not foreclose this Court from acting. Rather, Congress " 'has largely left to this Court the responsibility for fashioning the controlling rules.' " *Moragne* v. *State Marine Lines, Inc.*, 398 U.S. 375, 405 n.17 (1970) (citation omitted). That the Court would do so in a manner consistent with congressional guidelines on the subject (albeit in a different context) is to be expected.

CONCLUSION

For the reasons stated, the undersigned States respectfully request that the Court adopt the Special Master's recommendations in their entirety.

Respectfully submitted,

DANIEL E. LUNGREN
Attorney General
RODERICK E. WALSTON
Chief Assistant Attorney General
THOMAS F. GEDE
(Counsel of Record)
Special Assistant Attorney General
YEORYIOS C. APALLAS
Deputy Attorney General
1515 K Street, Suite 511
Sacramento, California 95814
(916) 323-7355
Counsel for Plaintiff-Intervenor State of California

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WILLIAM BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Special Counsel for Plaintiff-Intervenor States of Alabama, et al.

August 31, 1992

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 261-7300

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
4th and Center Streets
Little Rock, Arkansas 72201
(501) 682-2007

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

CHRIS GORMAN
Attorney General of Kentucky
700 Capitol Avenue
Capitol Building, Suite 116
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House
Augusta, Maine 04330
(207) 289-3661

WILLIAM L. WEBSTER
Attorney General of Missouri
Supreme Court Building
211 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box K
Juneau, Alaska 99811-0300
(907) 465-3600

ROBERT A. BUTTERWORTH
Attorney General of Florida
State Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

WARREN PRICE, III
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 548-4740

LINLEY E. PEARSON
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

MARC RACICOT
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street, CN112
Trenton, New Jersey 08625
(609) 292-4925

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 43266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

MARIO J. PALUMBO
Attorney General of West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 348-2021

JOHN P. ARNOLD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301-
6397
(603) 271-3658

NICHOLAS J. SPAETH
Attorney General of
North Dakota
Department of Justice
2115 State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

JAMES E. O'NEIL
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

R. PAUL VAN DAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

KENNETH O. EIKENBERRY
Attorney General of Washington
Highways-Licenses Building,
PB71
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

Supreme Court, U.S.
FILED
APR 2 1992
OFFICE OF THE CLERK

No. 111, Original

In the Supreme Court of the United States.

October Term, 1991

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
COMMONWEALTH OF MASSACHUSETTS,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

BRIEF OF THE COMMONWEALTH OF MASSACHUSETTS IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

John T. Montgomery*
First Assistant Attorney General
George K. Weber
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

March, 1992

*Counsel of Record

TABLE OF CONTENTS

JURISDICTION 3

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 7

ARGUMENT 8

I. MASSACHUSETTS IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO FED. R. CIV. P. 24(a)(2) 8

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO FED. R. CIV. P. 24(b)(2) 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

Cases

Pennsylvania v. New York,
407 U.S. 206 (1972) 5, 9

Texas v. New Jersey,
379 U.S. 674 (1965) 5, 6, 7, 9

Constitutional Provisions

Constitution of the United
States, Article III, Section 2 3

Statutory Provisions

28 U.S.C. § 1251(a) 4

Miscellaneous

Fed. R. Civ. P. 24(a)(2) 7, 8

Fed. R. Civ. P. 24(b)(2) 8, 11

U.S. Sup. Ct. R. 17.2 8

No. 111, Original

In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

COMMONWEALTH OF MASSACHUSETTS,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File a Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and

Defendant State of New York ("New York") regarding which state is entitled to claim and take possession of certain unclaimed intangible property held by securities brokerage firms incorporated in Delaware.

On February 21, 1989, the Court granted the State of Texas' motion to file a complaint in intervention. On various dates the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West

Virginia, Wisconsin, Wyoming, and the Commonwealths of Kentucky, Virginia and Pennsylvania as well as the District of Columbia have filed motions to intervene in this matter.

On January 28, 1992, the Special Master appointed by the Court, Thomas H. Jackson, Esquire, issued a report wherein he recommended that all applications for intervention filed prior to the Supreme Court's final decree be granted.

The Commonwealth of Massachusetts (hereinafter "Massachusetts"), seeks leave to intervene in this action.

JURISDICTION

The Court has accepted the original jurisdiction of this action pursuant to Article III, Section 2 of the

Constitution of the United States and under United States Code Title 28 Section 1251(a).

STATEMENT OF THE CASE

This case involves every State in the Union and will determine the ownership of potentially significant amounts of unclaimed property. Massachusetts requests leave to intervene in this action for purposes of sharing in any relief granted by this Court and asks the Court to permit it to file its proposed Complaint in Intervention.

The property at issue in this action consists of unclaimed intangible property consisting of dividends, interest and other distributions arising out of security transactions. The owner of the property at issue is unknown, and

the property itself has become abandoned. Under current practice, New York has been taking custody of abandoned dividends, interest and distributions from brokerage houses located in New York.

The parties to this action all claim the property, or a portion thereof, pursuant to the rules of priority established by this Court in Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972). However, the parties to this action differ as to their interpretation of Texas v. New Jersey and as to their characterization of the unclaimed property. The parties have advanced four different theories.

New York argues that the unclaimed dividends and distributions it has escheated are owner-known, the owner

being a brokerage house with a trading address in New York. Delaware claims that the brokerage houses holding the unclaimed distributions are the "debtors" according to Texas v. New Jersey, and, therefore, the state of incorporation of the "debtor" broker is entitled to the unclaimed revenue. The Texas theory suggests that the "debtor" in this case is the issuer of the stock or bond, and, therefore, the state of incorporation of the "debtor" issuer is entitled to the unclaimed revenue. The California theory argues that fairness and Texas v. New Jersey require that the unknown dividends and distributions be allocated among the states in proportion to the commercial activities which gave rise to the unclaimed property.

Massachusetts seeks to intervene in this action for the purposes of sharing

in any relief granted by this Court and to protect its claim to property held by New York that may eventually be returned to Massachusetts.

SUMMARY OF ARGUMENT

I. Massachusetts is entitled to intervene in this action as a matter of right pursuant to the requirements of Rule 24(a)(2) of the Federal Rules of Civil Procedure and the standards set forth in Texas v. New Jersey. Massachusetts claims the right to possession of portions of property that is the subject of this suit pursuant to any potential remedy fashioned by the Supreme Court.

II. Massachusetts claims an interest in the property that is the subject of this suit, and the

intervention of Massachusetts will not unduly delay this action or prejudice the rights of the original parties. Having satisfied the requirements for permissive intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure, Massachusetts' Motion for Leave to File Complaint in Intervention should be granted.

ARGUMENT

I. MASSACHUSETTS IS ENTITLED TO INTERVENE AS A MATTER OF RIGHT PURSUANT TO FED. R. CIV. P. 24(a)(2).

Massachusetts has the right to intervene in this action under Rule 24(a)(2) of the Federal Rules of Civil Procedure, as incorporated by Sup. Ct. R. 17.2, because it has an interest in

the property that is the subject of this action - unclaimed intangible dividends, interest and distributions held by brokerage houses. The Commonwealth has an interest in any remedy fashioned by this Court especially insofar as it would determine Massachusetts' right to certain unclaimed intangible personal property held by the State of New York.

This Court has consistently allowed governmental bodies with an interest in property subject to conflicting claims to intervene. See Pennsylvania v. New York, 407 U.S. 206 (1972); Texas v. New Jersey, 379 U.S. 674 (1965). In the present case, Texas was allowed to intervene.

The decision of the Court in this action may determine the right of Massachusetts to claim and take

possession of certain unclaimed intangible personal property. It is, therefore, important that Massachusetts be allowed to intervene and to participate in the discovery process to identify specific property to which it is entitled. Massachusetts' interest is not adequately represented by existing parties because this is not a class action; the parties cannot be expected to protect the interests of Massachusetts; and Massachusetts' absence from this litigation may prejudice its rights to recover the intangible property in question.

The standards for intervention as a matter of right have been satisfied, and Massachusetts should be granted leave to intervene.

II. IN THE ALTERNATIVE, PERMISSIVE INTERVENTION IS APPROPRIATE PURSUANT TO RULE 24(b)(2) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 24(b)(2) of the Federal Rules of Civil Procedure allows the Court discretion to allow permissive intervention where appropriate. The Court should permit Massachusetts to intervene because Massachusetts is a sovereign State with an interest in the outcome of this litigation and has raised issues of law or fact common to those already before the Court. Massachusetts' participation in this case will facilitate the resolution of factual issues and applicable law.

Intervention by Massachusetts will not unduly delay this action or prejudice the rights of the original parties. Moreover, Massachusetts'

intervention will obviate the need for Massachusetts to file a separate action against New York pursuant to a new rule announced by the Supreme Court, thus expediting the ultimate resolution of the entire controversy and promoting judicial economy and efficiency.

Massachusetts has satisfied the standards for permissive intervention and the Court should exercise its discretion to allow Massachusetts to intervene.

CONCLUSION

Massachusetts' Motion for Leave to File Complaint in Intervention should be granted.

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

John T. Montgomery
First Assistant Attorney General
(Counsel of Record)
George K. Weber
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: March 31, 1992

9440H

MAY 15 1992
MOTION FILED
APR 2 1992

No. 111, Original

In the
Supreme Court of the United States.

October Term, 1991

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
COMMONWEALTH OF MASSACHUSETTS,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE COMPLAINT IN INTERVENTION AND COMPLAINT IN INTERVENTION

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

John T. Montgomery*
First Assistant Attorney General
George K. Weber
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

March, 1992

*Counsel of Record

No. 111, Original

In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

COMMONWEALTH OF MASSACHUSETTS,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

MOTION OF THE COMMONWEALTH OF MASSACHUSETTS FOR LEAVE TO FILE COMPLAINT IN INTERVENTION

Pursuant to Rule 17 of the Rules of the Supreme Court, the Commonwealth of Massachusetts (hereinafter "Massachusetts"), a sovereign state of the United States of America, by and through its Attorney General, moves this

Court for an order permitting it to intervene in the above-entitled case for the purpose of sharing in any remedy fashioned by this Court and permitting it to file its Complaint in Intervention, attached hereto. In support of this motion, and as more fully set forth in Massachusetts' Brief in Support of Motion for Leave to File Complaint in Intervention, Massachusetts alleges as follows:

I.

1. On May 31, 1988, this Court granted Plaintiff State of Delaware's ("Delaware") Motion for Leave to File a Complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and the State of New York ("New York") regarding

which State is entitled to claim and take possession of certain unclaimed intangible property held by securities brokerage firms incorporated in Delaware.

2. On December 12, 1988, the Court appointed Thomas H. Jackson, Esquire as Special Master in this case.

3. On February 21, 1989, the Court granted the State of Texas' motion to file a complaint in intervention.

4. On various dates the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma,

Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin, Wyoming, and the Commonwealths of Kentucky, Virginia and Pennsylvania as well as the District of Columbia have filed motions to intervene in this matter.

5. On January 28, 1992, the Special Master issued a report with his recommendations to the Supreme Court. The Master recommended that all applications for intervention filed prior to the Supreme Court's final decree be granted.

6. Massachusetts' motion is timely in light of all the circumstances. Intervention by Massachusetts will not delay the progress of this case.

7. As set forth in the attached proposed Complaint in Intervention, Massachusetts seeks to share in any remedy fashioned by this Court in this action and seeks a determination of its right to certain unclaimed intangible personal property held by the State of New York pursuant to any relief granted by this Court.

8. The decision of the Court in this action may determine the right of Massachusetts to claim and take possession of certain unclaimed intangible personal property.

9. Massachusetts' interests are not adequately represented by Delaware, Texas or the other intervening states because neither Delaware, Texas nor the other intervening states can be expected

to identify, advocate and protect the rights of Massachusetts for the following reasons: (i) none of the other parties to the suit have any incentive to identify the property held by New York which may belong to Massachusetts; and (ii) Massachusetts' claims are based on its abandoned property statute, which neither Delaware, Texas nor the other intervening states can have sufficient familiarity so as to adequately represent the interests of Massachusetts.

10. For the foregoing reasons, Massachusetts is entitled to intervene as a matter of right pursuant to Rule 24(a)(2) of the Federal Rules of Civil Procedure.

II.

11. Alternatively, Massachusetts requests this Court to exercise its discretion and allow intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

12. A determination of Massachusetts' claims to the unclaimed intangible property involved in this case involves questions of law or fact common to those already before the Court.

13. Massachusetts' intervention will aid in the resolution of factual issues and the application of the law to the facts.

14. Massachusetts' intervention will not unduly delay or prejudice the adjudication of the rights of the parties to this action.

15. Massachusetts' intervention will avoid a multiplicity of lawsuits by obviating the need for Massachusetts to file a separate action against New York, thus expediting the ultimate resolution of the entire controversy and promoting judicial economy and efficiency.

16. For the foregoing reasons, Massachusetts should be allowed permissive intervention pursuant to Rule 24(b)(2) of the Federal Rules of Civil Procedure.

III.

17. Wherefore, Massachusetts prays that its Motion for Leave to File Complaint in Intervention for Purposes

of Sharing in Any Remedy Fashioned by this Court be granted.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

John T. Montgomery
First Assistant Attorney General
(Counsel of Record)
George K. Weber
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: March 31, 1992

9441H

No. 111 Original

In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

COMMONWEALTH OF MASSACHUSETTS,
Applicant for Intervention,

v.

STATE OF NEW YORK,
Defendant.

COMPLAINT IN INTERVENTION BY THE COMMONWEALTH OF MASSACHUSETTS

I. JURISDICTION

1. This Court has original jurisdiction over the present parties pursuant to Article III, Section 2, and Section 1251(a) of Title 28 of the U.S. Code.

II. THE PENDING ACTION

2. On May 31, 1988, the Court granted the State of Delaware leave to bring this action against the State of New York to resolve a controversy between Delaware and New York regarding which state is entitled to claim and take possession of certain unclaimed intangible property ("excess receipts"). These excess receipts consist of dividends, interest, and other distributions arising out of security transactions that are held by securities brokers incorporated in Delaware.

3. On December 12, 1988, the Court appointed a special master for the dispute.

4. On February 21, 1989, the Court granted the State of Texas' motion to

file a complaint in intervention that broadened the property in dispute to include dividends, interest, and other distributions ("additional excess receipts") held by Depository Trust Corporation or Cede & Co., which have not been claimed by brokerage and bank members of the Depository Trust Co.

5. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington,

West Virginia, Wisconsin, Wyoming and the District of Columbia have filed motions to intervene accompanied by complaints in intervention. Some of these complaints would expand the scope of litigation to include unclaimed intangible property held by all brokerage firms, wherever incorporated.

6. On January 28, 1992, the Special Master issued a report with his recommendations to the Supreme Court. The Master recommended that all applications for intervention filed prior to the Supreme Court's final decree be granted.

III. THE COMMONWEALTH OF MASSACHUSETTS

7. The Commonwealth of Massachusetts in this action acts by and through the Attorney General of

Massachusetts, the official of the Commonwealth of Massachusetts exclusively authorized under the laws of the Commonwealth to represent the Commonwealth in litigation. Mass. Gen. Laws c. 12, § 3.

IV. CLAIM BY THE COMMONWEALTH OF MASSACHUSETTS

8. Under the principles of law enunciated in Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972), the Commonwealth of Massachusetts is entitled to share in any remedy fashioned by the Supreme Court in this case and to claim an undetermined portion of excess receipts and additional excess receipts held by the State of New York pursuant to any ruling of this Court in this case.

9. **WHEREFORE**, the Commonwealth of Massachusetts requests:

a. that the Commonwealth of Massachusetts be allowed to intervene herein;

b. for a judgment that portion of excess receipts and additional excess receipts to which the Commonwealth of Massachusetts is entitled by its Abandoned Property Act and other applicable principles of law;

c. for a judgment against the State of New York for excess receipts and additional excess receipts to which the Commonwealth of Massachusetts has been entitled but that have previously been seized by the State of New York, plus interest at the prevailing rate; and

d. for such further relief as this Court deems just.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

John T. Montgomery
First Assistant Attorney General
(Counsel of Record)
George K. Weber
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: March 31, 1992

9441H

Supreme Court, U.S.
FILED
DEC 28 1992

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

vs.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE FIRST AMENDED ANSWERS AND LEAVE TO FILE COUNTERCLAIMS

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

December 22, 1992

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

MOTION OF THE STATE OF NEW YORK FOR LEAVE TO FILE FIRST AMENDED ANSWERS AND LEAVE TO FILE COUNTERCLAIMS

The defendant State of New York, by its Attorney General Robert Abrams, hereby respectfully moves pursuant to Rule 17.2 of the Rules of this Court for leave to file the annexed First Amended Answers and leave to file compulsory counterclaims under Rule 13(f) of the Federal Rules of Civil Procedure. The Federal Rule allows a pleader, by leave of court, to set up counterclaims by amendment which were omitted through oversight, inadvertence, or excusable neglect, or when justice requires. New York proposes only minor technical amendments in order to plead compulsory counterclaims to offset its potential monetary liability if the Court adopts the Report of the Court-appointed Special Master (or any other theory which retroactively invalidates New York's prior escheat of abandoned intangible property). By its counterclaims, New York seeks

to collect abandoned intangibles which have been taken by other jurisdictions but would be owed to New York under new escheat rules. Thus, New York's counterclaims seek to achieve fairness by applying the Court's pronouncements equally to all escheated property in all other jurisdictions. The omission of these claims from New York's previously filed answers was excusable because the need for such relief has only become apparent with the issuance of the Special Master's Report, which raises the possibility that New York will have to pay out the property it has escheated in conformity with well-established principles of commercial and escheat law. Finally, New York's assertion of its counterclaims at this juncture will not prejudice any jurisdiction or burden the Court.

1. This is a case of original jurisdiction brought by the State of Delaware against the State of New York. The Court granted Delaware leave to file its complaint on May 31, 1988. 486 U.S. 1030. The Court appointed Thomas H. Jackson as Special Master in an order dated December 12, 1988. 488 U.S. 990.

2. In its complaint, Delaware disputed New York's right to take custodial possession of unclaimed dividend and interest overpayments on stocks and bonds paid by the issuers of the underlying securities (or their agents) to brokerage firms trading in New York but incorporated in Delaware.

3. The State of Texas moved for leave to file a complaint as a plaintiff-intervenor, which the Court granted on February 21, 1989. 489 U.S. 1005. Texas asserted a competing claim to the property sought by Delaware whenever the issuers of the underlying securities were domiciled in Texas, and laid claim to other property taken by New York – unclaimed securities distributions paid by Texas-incorporated issuers and Texas municipalities to New York-domiciled banking institutions, including The Depository Trust Company (DTC), a securities depository incorporated under the New York Banking Law.[1]

---

[1] Texas' claims for the property remitted to New York by New York banking institutions were set forth in an amended complaint in intervention lodged in October 1989. The Report of the Special Master recommends that the Court grant Texas' motion for leave to file this pleading. Report at A-2.

4. On November 17, 1989, other jurisdictions – the States of California, Michigan, Ohio, and Rhode Island (subsequently joined by the District of Columbia) – moved for leave to intervene to assert a claim to a portion of the unclaimed securities distributions remitted to New York by New York debtor brokers and banks, and DTC. These jurisdictions articulated a "commercial activities" theory which accorded the right to take custody of (or escheat) the property to the presumed domiciles of the beneficial owners of the underlying securities.[2]

5. All other States have moved for leave to file complaints in intervention and, with the exception of the Commonwealth of Massachusetts, adopted one of the pending intervention theories.[3] The Special Master has recommended that the Court grant all applications to intervene. Report of the Special Master at A-2. The Massachusetts motion, brought after the issuance of the Report, was granted by the Court in its order dated October 5, 1992.

6. New York answered Delaware's complaint on July 27, 1988. It lodged an answer to the Texas complaint in intervention on April 21, 1989, and to Texas' amended complaint on November 17, 1989. Also on November 17, 1989, New York answered the complaint of various States led by the State of Alabama, which was modeled on the Texas pleading. Finally, on July 20, 1990, New York interposed an answer to the complaints in intervention of the States initially advocating the commercial activities theory. New York has not been required to answer any other complaints in intervention. *See* Litigation Management Order No. 1, dated October 18, 1989, at ¶ 10.

7. Under the Court's escheat precedents, the jurisdiction with the right to escheat abandoned intangibles is the State of

---

[2] The States of California, Ohio, and Rhode Island have abandoned this theory in favor of the one advocated by Texas.

[3] Massachusetts merely asserted that it was "entitled to share in any remedy fashioned by the Supreme Court in this case." Motion of the Commonwealth of Massachusetts for Leave to File Complaint in Intervention and Complaint in Intervention, dated March 31, 1992, at 14.

last known address of the creditor as shown by the debtor's books and records (the primary rule). *Texas v. New Jersey*, 379 U.S. 674 (1965); *Pennsylvania v. New York*, 407 U.S. 206 (1972). In the event that the primary rule cannot be applied, the right is conferred upon the debtor's state of incorporation (the backup rule). *Id.* During the more than 20 years that elapsed between the announcement of the *Texas v. New Jersey* rules and the onset of this case, all States whose abandoned property laws provided coverage for unclaimed securities distributions uniformly defined the creditor as the apparent owner shown by the debtor's books and records, and the debtor as the holder of the payment obligation.

8. On January 28, 1992, the Special Master issued a Report which recommended a completely novel interpretation of the terms "creditor" and "debtor" in the *Texas v. New Jersey* rules as applied to the property in question. Adopting a theory devised by the State of Texas, the Master concluded that the creditor of an unclaimed distribution is the beneficial owner of the underlying security, not the apparent owner as shown by the debtor's books and records. Since the beneficial owner can not be determined from the debtor's books, the Master's result requires that all of the property in question escheat under the *Texas* backup rule.

9. With regard to the *Texas* backup rule, the Master defined the debtor as the corporate or municipal issuer of the underlying security regardless of whether the issuer had discharged its debt by paying the distribution to the record owner of the security — a brokerage firm, custodian bank, or securities depository holding title to the security for another in the institution's nominee name. In addition, the Master recommended that the Court change the standard for locating the debtor under the backup rule, from its State of incorporation to its State of chief or principal executive office. All of the Report's innovations were placed before the Court with the further recommendation that they be made fully retroactive.

10. If the Court adopts the Master's Report in its entirety, New York will be liable to the 50 States and the District of Columbia

for most of the unclaimed securities distributions remitted by New York's institutional record holders. New York would be entitled to retain only the property paid by issuers whose chief executive offices were in New York at the time of the escheat. Even if the Court preserved the State of incorporation provision of the *Texas* backup rule to locate the debtor's jurisdiction, New York would still be liable for most of the funds since it claimed this property according to the uniform understanding of the record owner, not the issuer, as the debtor. Thus, under either scenario, New York's financial burden would be extraordinary.

11. As an offset to its potential monetary liability, New York now seeks leave to amend its answers to assert compulsory counterclaims against all other jurisdictions that are or will be made parties to this action. The counterclaims address the property which these jurisdictions have escheated according to the States' uniform understanding of the *Texas* v. *New Jersey* rules, but which property would be owed to New York if the Court adopts the Special Master's Report or retroactively changes the rules in any other way. In other words, New York is requesting no more than a minor technical amendment to its pleadings to ensure that any changes in the escheat rules which the Court may adopt retroactively are applied equally to all escheated intangibles in all other jurisdictions, not just to the property remitted to New York. As will be demonstrated here, New York's prior omission of these counterclaims was excusable. In addition, the relief it seeks is completely consistent with the concern for justice that underscores the granting of permission to file omitted counterclaims. *See* F.R.C.P. Rule 13(f). Finally, New York's counterclaims will not prejudice the parties nor burden the Court since they raise no new legal issues nor require further briefing, and will only affect the implementational phase of the case.

12. Rule 13(f) of the Federal Rules of Civil Procedure gives the courts considerable discretion in granting parties leave to amend their answers to file omitted counterclaims, in order to further the Rule's overall goal of resolving disputes insofar as possible on the merits and in a single judicial proceeding. The

courts should be liberal in permitting amendments to include compulsory counterclaims since such claims may be barred in subsequent actions on the ground of res judicata. *See Spartan Grain & Mill Co. v. Ayers*, 517 F.2d 214, 220 (5th Cir. 1975); *Rosenberg Bros. & Co. v. Arnold*, 283 F.2d 406 (9th Cir. 1960). In denying leave to amend a pleading, delay alone is not a sufficient ground. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 330-31 (1971); *Mercantile T. C. N. A. v. Inland Marine Products Corp.*, 542 F.2d 1010, 1012 (8th Cir. 1976). The courts may, however, consider such other factors as prejudice to the non-moving party, the strain on the court's docket, and whether additional discovery will be required. *See Barnes Group, Inc. v. C&C Products, Inc.*, 716 F.2d 1023, 1035 n.35 (4th Cir. 1983). New York's request for leave to amend satisfies the discretionary criteria under Rule 13(f) and does not entail any of the factors that might warrant denial of its motion.

13. Consistent with Rule 13(f), the Court should allow New York's counterclaims because their omission was excusable. New York's claims concern property which would be owed to New York in the event that the Court retroactively adopted one of the legal theories proposed by the intervenors. Since those theories are novel - contradicting the Court's escheat precedents, uniform commercial law principles and the States' own escheat practices — it was reasonable for New York to omit counterclaims requiring the assumption that one of the theories in intervention would be adopted *and* be given retroactive effect.

14. The need for New York to assert its counterclaims has only become apparent with the Special Master's recommendation that the Court adopt the issuer-debtor theory advocated by Texas and Alabama, *et al.*, and apply it retroactively along with a change in the locator under the *Texas* backup rule. Although New York, Delaware, and *amici curiae* representing financial institutions throughout the country, have vigorously opposed the Master's Report, its existence now requires New York to take steps to pursue its own remedial options. In addition, it would have been impossible for anyone to predict that the Master would propose a retroactive change in the locator under the *Texas* backup rule

from the debtor's State of incorporation to that of its chief executive office.

15. A further and independent ground for granting New York's motion under Rule 13(f) is the provision allowing for omitted counterclaims "when justice requires." In this regard, it would be patently unfair to subject only New York to the retroactive application of new escheat principles while permitting other jurisdictions to retain property owed to New York under those very same principles. Since all jurisdictions followed escheat practices that coincided with New York's, none should be exempt from the practical consequences of invalidating those practices in the context of this action. Moreover, the Master's recommendation that New York "disgorge" all of the property it escheated (unless congruent with the new principles), if adopted, will create a fiscal drain of monumental proportions and generate statewide economic hardship. The proposed counterclaims will enable New York to obtain some limited mitigation of its potential liability by allowing it to reciprocally claim the property to which it is entitled from other jurisdictions.

16. Finally, New York's counterclaims do not raise any new legal issues, will not require the submission of additional briefs, and will not create any increased burdens for the Court. The counterclaims seek only the equal application of any retroactive rulings by the Court to the escheat practices of all jurisdictions, not just to those of New York. Since the motion follows on the heels of the Master's Report and before the Court's resolution of the jurisdictions' competing legal theories, the filing of New York's counterclaims at this juncture neither prejudices the parties nor burdens the Court. Indeed, the Master has provided that the action be remanded to him for continued supervision, *inter alia*, over "the allocation of specific distributions under the principles of this Court's decision and this Decree." Report at A-4 to 5. Thus, New York's counterclaims should be allowed because they pertain only to the implementational phase of this case, for which the Master has already reserved additional proceedings.

WHEREFORE, the State of New York respectfully moves this Court that leave be granted to file the annexed First Amended Answers and counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
JERRY BOONE
Solicitor General of the
State of New York
Counsel of Record
By:

Robert A. Forte

ROBERT A. FORTE
Assistant Attorney General
of Counsel
120 Broadway
New York, New York 10271
(212) 416-8018

APPENDIX

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO THE COMPLAINT OF THE STATE OF DELAWARE

The State of New York, defendant, by its counsel, for its first amended answer to the complaint of the State of Delaware, says:

1. It admits the allegations in paragraph 1 of the complaint.

2. It admits the allegation in paragraph 2 of the complaint that there is a dispute between the two states but denies that the dispute is ripe and within the original jurisdiction of this Court.

3. It admits the allegation in paragraph 3 that brokers doing securities brokerage business in New York and incorporated in Delaware ("debtor brokers") hold or held monies and other intangible property, but it denies that it wrongfully escheated such property. It is without knowledge or information sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 3 that the debtor brokers have no identification or last known address of anyone claiming to be the *beneficial* owner of the distributions held or formerly held for the account of customers.

4. It denies the allegations in paragraph 4 of the complaint that Delaware is entitled to escheat distributions held or formerly held by debtor brokers. The remainder of paragraph 4 states legal conclusions to which no response is required.

5. It admits the factual allegations in paragraph 5 of the complaint except that it is without knowledge or information sufficient to form a belief as to the truth of the allegation that no other state besides New York is asserting a right contrary to Delaware's claims.

6. It denies the allegations in paragraph 6 of the complaint to the extent that they suggest that no brokerage corporation with a New York trading address incorporated in Delaware would be entitled to claim any of the abandoned property at issue in this case and states that the terms of section 1404 of the New York Abandoned Property Law speak for themselves.

7. It admits that the corporations listed in paragraph 7 have offices in New York, conduct business in New York, and were incorporated in Delaware at the time the complaint was filed, except for The First Boston Corporation, which has been incorporated in Massachusetts since 1932. It is without knowledge or information sufficient to form a belief as to the truth of the allegation that each of their predecessors were incorporated in Delaware.

8. It admits the allegations in the first and second sentences of paragraph 8 of the complaint. It admits that debtor brokers regularly allocate to the accounts of their customers amounts equal to the distributions to which they are beneficially entitled, but denies that these allocations always occur as payments are received from the issuer of the underlying securities.

9. It admits that, in certain instances, the debtor brokers may be unable to identify the *beneficial* owners of distributions. It admits the allegation that a debtor broker may sell its customer's securities in the open market and that a broker ("creditor broker") buying such securities in its own name (assuming that this is what the plaintiff means by "ultimate acquiror") may fail to remove the debtor broker's name as record owner of such securities before the record date on which a distribution becomes payable to that debtor broker. It is without knowledge or information sufficient to form a belief as to the truth of the allegation in the third sentence of paragraph 9 concerning the circumstances under which a debtor broker will know who the *beneficial* owner of a distribution may be after the sale of the underlying security to a creditor broker or the address of that *beneficial* owner. It denies that when no claim is made for a distribution that the debtor broker holds property of unknown creditors or creditors whose address cannot be determined from the books and records of the debtor broker.

10. It denies the factual allegations in paragraph 10 of the complaint except that it admits that since July 13, 1971, Delaware has had an Escheat Law which provides for the escheat of the property claimed by Delaware at issue in this case and states that the terms of sections 1198(6), (8), and (10) of the Delaware Escheat Law speak for themselves.

11. It admits the factual allegation in paragraph 11 of the complaint to the extent that New York has taken custody of abandoned property held by debtor brokers, but denies the remaining allegations of that paragraph.

12. It admits that since April 1, 1952, New York has provided that its Comptroller may take custody of personal property held by any corporation engaging in New York in the purchase, sale, or exchange of securities for or on behalf of any customers, but states that the terms of article V-A of the New York Abandoned Property Law speak for themselves.

13. It admits the factual allegation in paragraph 13 of the complaint that New York formerly published and disseminated a book entitled *Abandoned Property Law Handbook for Brokers and Dealers*, but states that this book has been superceded by a volume entitled *Handbook for Reporters of Unclaimed Funds* (2d ed. 1988), a copy of which has been lodged with the Clerk.

14. It admits that the text of the superceded *Abandoned Property Law Handbook for Brokers and Dealers* quoted in paragraph 14 of the complaint is accurate, but it denies that the characterization of New York's position is accurate.

15. It admits that the text of the superceded *Abandoned Property Law Handbook for Brokers and Dealers* quoted in paragraph 15 of the complaint is accurate, but denies that New York claims that it is entitled to retain custody of property abandoned by creditors which do not have New York addresses.

16. It admits the allegations in the first sentence of paragraph 16 of the complaint to the extent that New York has taken custody pursuant to its Abandoned Property Law of abandoned property held by debtor brokers and denies the remainder. It admits the allegations of the second sentence of that paragraph to the extent that most of the debtor brokers have complied with their obligations under the Abandoned Property Law but is without knowledge or information sufficient to form a belief as to the truth of the allegations concerning the reasons that debtor brokers may have given for refusing payment to Delaware of abandoned property. The terms of section 1404 of the Abandoned Property Law speak for themselves.

17. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in paragraph 17 of the complaint, but states that at the time the complaint was filed, at least three debtor brokers had refused to turn over abandoned property to the Comptroller.

18. It admits the allegation in the first sentence of paragraph 18 of the complaint to the extent that Paine Webber Incorporated ("Paine Webber") has declined to deliver abandoned property to the Comptroller, but denies that Delaware has correctly characterized Paine Webber's position. It admits that New York has commenced an administrative proceeding which is still pending against Paine Webber seeking recovery of abandoned property.

19. It admits the allegation in the first sentence of paragraph 19 of the complaint to the extent that Smith Barney, Harris Upham & Co. Incorporated ("Smith Barney") has refused to deliver abandoned property to the Comptroller, but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the reasons for the refusal. It states that New York has not yet commenced an administrative proceeding against Smith Barney to recover abandoned property in Smith Barney's possession.

20. It admits the allegation in the first sentence of paragraph 20 to the extent that Kidder Peabody & Co. Incorporated ("Kidder Peabody") has refused to deliver abandoned property to the Comptroller, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the reasons for the refusal. It states that New York has not yet commenced an administrative proceeding against Kidder Peabody to recover abandoned property in Kidder Peabody's possession.

21. It admits the allegations in the first sentence of paragraph 21 to the extent that New York has taken custody of substantial amounts of abandoned property held by debtor brokers which

remains unclaimed by creditor brokers whose trading addresses, as shown by the books and records of the debtor brokers, are in New York, but denies that it took custody of such property wrongfully. It admits the allegations in the second sentence of the paragraph. It is without knowledge or information sufficient to form a belief as to the truth of the allegations in the third sentence of that paragraph concerning what information the plaintiff received. It admits the allegations in the remainder of the paragraph except that it denies New York took property rightfully belonging to Delaware or that the creditors or their addresses cannot be determined from the books and records of the debtor corporations.

22. It admits the allegations in paragraph 22 of the complaint to the extent that there is a dispute between Delaware and New York concerning abandoned property but denies that the dispute is a "controversy" within the meaning of article III, section 2 of the United States Constitution.

23. It denies the allegations in paragraph 23 of the complaint.

24. It denies the allegations in paragraph 24 of the complaint.

25. It denies the allegations in paragraph 25 of the complaint.

26. It denies the allegations in paragraph 26 of the complaint.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Delaware failed to file a claim with the New York State Comptroller before commencing this action.

2. Delaware has failed to exhaust administrative remedies.

3. Delaware's claims are barred by laches and waiver.

4. Delaware has failed to state a claim upon which relief can be granted.

5. Under existing law, Delaware is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined from the books and records of the debtor brokers.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to the State of Delaware under its abandoned property law, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to the State of Delaware under its abandoned property law, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its

paying agent to the State of Delaware under its abandoned property law, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner – broker, bank, or securities depository – to the State of Delaware under its abandoned property law, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to the State of Delaware under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking

of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to the State of Delaware under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the complaint or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
of Counsel

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO THE AMENDED COMPLAINT OF THE STATE OF TEXAS

The State of New York, defendant, by its counsel, for its first amended answer to the amended complaint of the State of Texas, says:

1. It admits the allegation in paragraph 1 of the amended complaint that the State of Texas ("Texas") has invoked the original jurisdiction of this Court under article III, section 2 of the Constitution of the United States and section 1251 of title 28 of the United States Code, but denies that this Court has jurisdiction

on the ground that the dispute is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. It admits the allegations in paragraph 2 of the amended complaint.

3. It admits the allegations in paragraph 3 of the amended complaint.

4. It admits the allegations in paragraph 4 of the amended complaint.

5. It admits the allegations in the first sentence of paragraph 5 to the extent that the litigation at the time Texas filed its motion for leave to file a complaint in intervention involved a dispute concerning which state was entitled to the custodial taking of abandoned property ("abandoned dividends"), and denies the remainder. It denies that the definition of "Excess Receipts" in paragraph 5 is accurate except that it includes "Distributions" received by brokerage firms incorporated in various states for the benefit of their customers which exceed the amounts to which the brokerage firms which received the "Distributions" were entitled. It denies the allegations in the last sentence of paragraph 5, except it admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute.

6. It admits that the first two sentences of paragraph 6 accurately describe the relief which Texas is seeking, but denies that "Additional Excess Receipts" involve the same issues as "Excess Receipts." It denies the allegations in the third sentence of paragraph 6, which defines "Additional Excess Receipts" inconsistently with the definition on page 11, except that it admits that The Depository Trust Company ("DTC"), a trust company incorporated in New York, is a national clearinghouse for the

settlement of trades in corporate and municipal securities and that DTC currently remits abandoned dividends owed to non-DTC participants to New York. New York also denies the accuracy of the definition on page 11 and states that the failure of Texas throughout the complaint to specify which of the two inconsistent definitions of "Additional Excess Receipts" is meant makes much of the amended complaint incomprehensible. It states that unclaimed principal and interest payments on municipal and state bonds which have been made to record owners of the bonds – such as DTC, brokers, or bank personal trust departments – where the creditor has abandoned them should be routinely remitted to Texas pursuant to section 72.101 of its Property Code. In such cases, since the obligation of the issuer to pay the record owner has been satisfied, the unclaimed principal and interest payments are no longer "debt obligations attributable to corporate and Governmental Issuers." On the other hand, principal and interest payments held by paying agents of corporate and governmental issuers which have not been paid to record owners remain "debt obligations attributable to corporate and Governmental Issuers." New York does not take custody of such funds under current law although Texas may do so under section 72.101 of its Property Code and at least 33 other states have coverage which is similar to that of Texas. It denies the allegations in the fourth sentence of paragraph 6.

7. It denies the allegation in paragraph 7 that the abandoned dividends at issue in this case constitute a debt of the issuers of the underlying securities to the beneficial owners, whose claims to dividends and distributions are satisfied in the ordinary course of business by brokers. The remainder of paragraph 7 states legal conclusions to which no response is required, but if a response is required it denies the allegations. It incorporates by reference here its response to paragraph 6.

8. Paragraph 8 for the most part states legal conclusions to which no response is required, but if a response is required, it denies the allegations. It denies the allegation in the second sentence of this paragraph that under existing practice a debt

of identical character is remitted to the issuer's state of incorporation when held by the issuer's paying agent. A paying agent of the issuer reports unclaimed dividends which have not been paid to record owners to the state where the issuer (debtor) is incorporated when the address of the unpaid record owner (creditor) cannot be determined from the books and records of issuer. Unclaimed funds held by record owners – such as DTC or brokers – are of an entirely different character.

9. It admits that paragraph 9 accurately characterizes the relief which Texas is seeking, but it otherwise denies the allegations in this paragraph. It incorporates by reference here its response to paragraph 6.

10. It admits that Texas is asserting its claim pursuant to chapter 72 of the Texas Property Code, Tex. Prop. Code Ann. § 72.001 *et seq.* (Vernon Supp. 1989) ("Texas Property Code"), but states that the terms of this statute speak for themselves.

11. It admits the allegations in the first sentence of paragraph 11. It denies the allegation in the second sentence that the process by which securities distributions are made is generally understood only by persons within the "Distribution System." It denies that the two charts attached as exhibits "1" and "2" are accurate.

It denies that the definition of "Additional Excess Receipts" is accurate and incorporates by reference here its response to paragraph 6. The last sentence in the definition of "Additional Excess Receipts" states a legal conclusion to which no response is required. On information and belief, it denies that "Distributions," as defined by Texas, received by DTC for its participants in transactions between its participants give rise to unclaimed funds which are deemed abandoned and turned over to the Comptroller.

It denies that the definition of "Customer" is accurate and states that "customer" is defined in section 510(6) (a) of the New

York Abandoned Property Law, but admits that the definition of "Beneficial Owner" is accurate, but only if qualified in the context of this case to indicate that these economic rights to distributions are routinely satisfied by brokers on the record date and, therefore, the Beneficial Owner has no economic right against the issuer.

It admits that the definition of "Book Entry Accounting" is accurate.

It admits that the definition of "Book Entry Certificate System," to the extent it is limited to DTC, is accurate, except that physical certificates are registered for DTC only in the name of its nominee, Cede & Co., but it otherwise denies the allegations in this paragraph.

It admits that "Cede & Co." is the principal nominee used by DTC.

It admits that the description of DTC in the first two sentences of the definition is accurate but it is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation concerning the number of clearinghouses operating in the United States. On information and belief, it denies the allegation in the third sentence of the definition of DTC to the extent that it states that DTC provides the system described by making federal wire transfers to banks for accounts of DTC participants. It admits the allegations in the fourth sentence. The last sentence is too vague to permit a response, but if a response is required it denies the allegations in this sentence. It states that brokers actively trade for themselves or their customers; DTC is owned by its members and transfers issues between its members, but does not trade. Brokers are defined in section 510(4) of New York's Abandoned Property Law and banking organizations are defined in section 103(c) of that law.

It admits that the definition, "Distributions," as used in the complaint, means dividends, profits, principal, and interest and

securities representing any of the foregoing, but it otherwise denies the allegations in this paragraph.

It admits that the definition, "Distribution System," accurately describes how this term is used in the complaint.

It admits that the definition of "DTC Participant" is accurate and that all of the brokerage firms identified in Delaware's complaint are listed as DTC Participants in the December 31, 1987 DTC Annual Report.

It admits that, as used in the complaint, "Excess Receipts" means "Distributions" received by brokerage firms incorporated in Delaware for the benefit of their "Customers" which exceed the amounts to which the brokerage firms which received the "Distributions" were entitled. It admits that brokers sometimes maintain these funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute. It denies the remainder of the allegations in this definition.

It denies that the description of "Ex Dividend Date" or "Ex Date" is accurate and states that the explanations in New York Institute of Finance, *Introduction to Brokerage Operations Department Procedures* 133-35 and Committee on Stockbrokerage Auditing, American Institute of Certified Public Accountants, *Audits of Brokers and Dealers in Securities* 198-99 (1973) are recognized in the industry. New York lodged copies of these publications with the Court.

It admits that the definition of "Governmental Issuer" accurately describes how this term is used in the complaint.

It admits that "Intermediary" accurately describes how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Issuer" is accurate.

It admits that the definition of "Nominee" is generally accurate, but is without knowledge or information sufficient to form a belief as to the truthfulness of the allegation that the usual form of a "Nominee" is a general partnership.

It admits that the first sentence of the description of "Paying Agent" is accurate. It denies that the second sentence of the description of "Paying Agent" is accurate. The third sentence of the description of "Paying Agent" states a legal conclusion to which no response is required. It admits the allegations in the remainder of this paragraph.

It admits that the definition of "Physical Certificate" is substantially accurate.

It admits that the description of "Physical Certificate System" accurately reflects how this term is used in the complaint, but it otherwise denies the allegations in this paragraph.

It admits that the definition of "Record Date" is accurate.

It admits that the definition of "Record Owner" is accurate, except that a "Beneficial Owner" is not a "Record Owner" and a "Customer" rarely is a "Record Owner."

12. Paragraph 12 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph.

13. It admits the allegations in paragraph 13.

14. It admits the allegations in paragraph 14.

15. It admits the allegations in paragraph 15.

16. It admits the allegations in paragraph 16, except that it denies that interest is paid in all cases by check mailed to the record owner by the issuer's paying agent, although this is true in most cases.

17. It admits the allegations in paragraph 17.

18. It admits the allegations in paragraph 18, except that it denies, on information and belief, the allegations in the fourth sentence of this paragraph to the extent that they state that DTC participants deal with each other by re-registering all physical certificates in the name of Cede & Co. and by depositing all these physical certificates at DTC.

19. It admits the allegations in paragraph 19, but is without knowledge or information sufficient to form a belief as to the truthfulness of the percentage of new issues in which physical certificates are available to customers.

20. It admits the allegations in the first sentence of paragraph 20, but the remainder of the paragraph states legal conclusions to which no response is required, but if a response is required it denies the allegations in the remainder of the paragraph. The pleadings and briefs of Delaware and New York speak for themselves.

21. Paragraph 21 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The complaint and motion for leave to file a complaint of Delaware speak for themselves.

22. Paragraph 22 states legal conclusions to which no response is required, but if a response is required New York's position is that the abandoned property which Delaware claims consists mainly of dividend and interest overpayments owed by one broker ("debtor broker") to another broker or bank ("creditor broker"). They are not owed to the customers (beneficial owners) of creditor brokers because the customers have been fully satisfied by creditor brokers and, therefore, have no right to claim these overpayments. The majority of these creditor brokers have trading addresses in New York. The answer and brief in opposition to the motion for leave of New York speak for themselves.

23. Paragraph 23 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. The pleadings and briefs of the parties speak for themselves.

24. Paragraph 24 states legal conclusions to which no response is required, but if a response is required it denies the allegations in that paragraph. This Court's decisions and the federal statutes speak for themselves.

25. It admits the allegations in the first sentence of paragraph 25 of the complaint. The second sentence does not require a response, but if a response is required it denies the allegations in that sentence.

26. On information and belief, it denies the allegations in paragraph 26, on information and belief, it admits that generally trades of physical certificates between DTC participants occur on the books and records of DTC.

27. On information and belief, it admits the allegations in the first sentence of paragraph 27, except it denies that there are no circumstances in which DTC might have legal ownership rights in the physical certificates. It denies the allegations in the second sentence of paragraph 27.

28. It admits the allegations in the first sentence of paragraph 28 except it states on information and belief that purchases of securities held at DTC are also made through firms other than brokerage firms who are, or act through, DTC participants. It denies on information and belief the allegations in the second sentence to the extent that they suggest that all these purchases are made in book entry form only. It denies on information and belief the allegations in the third sentence to the extent that they suggest "customers" may never receive physical certificates from the issuer or from DTC participants. It denies on information and belief the allegations in the fourth sentence of paragraph 28 except that it admits that each "Customer" may maintain

an account at a DTC participant or other brokerage firm. It denies on information and belief the allegations in the fifth sentence of paragraph 28 except that it admits that, in some cases, the books and records of the DTC participant or other brokerage firm may constitute the only evidence of each "Customer's" legal ownership. It denies on information and belief the allegations in the sixth sentence of paragraph 28 except that it admits that when "Customers" purchase beneficial ownership from a DTC participant or other brokerage firm, they may send their "Customers" transaction statements confirming and setting forth the terms of the purchase. It admits the allegations in the seventh sentence of paragraph 28. The last sentence of paragraph 28 states legal argument to which no response is required, but if a response is required it denies on information and belief the allegations in that sentence.

29. It admits the allegations in the first two sentences of paragraph 29. It denies on information and belief the allegations in the last sentence of paragraph 29.

30. It admits the allegations in the first four sentences of paragraph 30, except it denies on information and belief the allegations in the third sentence to the extent that they state that the books and records of DTC evidence the amount and identity of physical certificates which are held by DTC participants. It denies on information and belief the allegation in the last sentence of that paragraph that there are three sets of "Record Owners" for the same securities.

31. It admits on information and belief the allegations in the first four sentences of paragraph 31. It denies on information and belief the allegations in the fifth sentence of this paragraph. It denies the allegations in the sixth sentence of this paragraph to the extent that they state that customers must wait until their brokers receive distributions in order to be paid.

32. It admits the allegations in paragraph 32, except denies on information and belief the allegations to the extent that they

state that there are three sets of books and records which indicate record ownership.

33. It denies the allegations in the first sentence of paragraph 33 to the extent that they suggest that brokers credit their customer accounts after receiving dividends from DTC. It denies the allegations in the remainder of the paragraph.

34. It denies on information and belief that the example in paragraph 34 accurately describes a typical transaction between two DTC participant brokers which gives rise to unclaimed abandoned dividends.

35. It denies on information and belief that the allegations in the first four sentences accurately describe the method of settling transactions between DTC participants. It admits the allegation in the final sentence of paragraph 35.

36. The first sentence of paragraph 36 does not require a response, but if a response is required it denies the allegations in the first sentence. It admits the allegations in remainder of that paragraph.

37. It admits the allegations in the first sentence of paragraph 37 except it denies on information and belief the allegations concerning the method of payment. It admits the allegations in the remainder of paragraph 37, except it denies on information and belief the allegation in the last sentence of that paragraph that the records of the issuer, DTC, and "DTC Participants" each reflect a different "Record Owner."

38. It denies on information and belief the allegations in the first sentence of paragraph 38. It admits the allegations in the second sentence of that paragraph. It denies the allegations in the last sentence of paragraph 38 except that it admits that in some cases abandoned dividends include physical certificates registered to Cede & Co., but usually such certificates are registered in the name of the broker.

39. It denies the allegations in the first sentence of paragraph 39 except it admits that DTC and DTC participants may function as agents of the "Beneficial Owner." It admits DTC has not claimed any legal ownership interest in the dividend overpayments at issue in this case, but denies that DTC participants have not claimed any right to abandoned dividends in the custody of the New York State Comptroller. It denies that brokerage firms are neither creditors nor debtors with respect to abandoned dividends in the custody of the Comptroller. The fourth sentence states legal argument to which no legal response is required, but if a response is required it denies the allegations in that sentence.

40. It denies the allegations in paragraph 40, except that it admits there may be a few cases in which a beneficial owner may not have received dividends or interest owed to the beneficial owners by the record owner.

41. It denies the allegations in the first sentence of paragraph 41 except that it admits that Delaware identified 15 DTC participants. It admits the allegations in the second and third sentences of paragraph 41. It denies the allegations in the fourth sentence of paragraph 41. It admits the allegations in the fifth and sixth sentences accurately describe the claim Texas is making in this case, but denies that Texas is entitled to any of the abandoned property claimed.

42. The first sentence of paragraph 42 states legal argument to which no response is required, but if a response is required it denies the allegations in that sentence. It denies the allegations in the second sentence of that paragraph.

43. It admits the allegations in paragraph 43 accurately describe the claim that Texas is making in this case, but denies that it should be considered by this Court and incorporates by reference here its response to paragraph 6.

44. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the first and

second sentences of paragraph 44. The third sentence of that paragraph is too vague to call for a response, but if a response is required it denies the allegations in the third sentence. It incorporates by reference here its response to paragraph 6.

45. It denies the allegations in the first sentence of paragraph 45. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of the paragraph, except that it admits that DTC denied Texas access to its books and records. The allegations in the third and fourth sentences of paragraph 45 are legal argument to which no response is required, but if a response is required it denies the allegations in those sentences. It admits that a copy, with typographical errors, of the November 28, 1988 letter of Patricia Trainor is attached to the complaint, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

46. It denies on information and belief the allegations in the first sentence of paragraph 46 except to the extent that it admits the letter describes the "Cede Float." It admits the allegations in the remainder of the paragraph, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

47. It admits the allegations in the first sentence of paragraph 47 to the extent that the quotation is accurate, but states that the contents of the letter speak for themselves. It admits the allegations in the second sentence of paragraph 47 to the extent that it states that funds in the "Unclaimed Dividends" account do not belong to DTC, but denies on information and belief the remainder of the allegations in that sentence. It admits the allegations in the third sentence of paragraph 47 to the extent that funds remaining in the "Unclaimed Dividends" account after three years that are deemed abandoned are remitted to New York, and denies the remainder, but states that the contents of the letter speak for themselves. It incorporates by reference here its response to paragraph 6.

48. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the first sentence of paragraph 48 concerning the sufficiency of the information provided by DTC to Texas. It admits the allegations in the second sentence of paragraph 48, except that it denies the amount attributable to Texas issuers is $32,511 and the period covered is correctly stated and states that the correct amount is $32,514 and the period covered is from July 31, 1981 through June 30, 1982. It admits the allegations in the first two sentences of footnote 7 of paragraph 48. It admits the allegations in the third sentence of footnote 7 of paragraph 48 that the Texas Treasury asked New York for a complete copy of an annual unclaimed property report filed by DTC for any one year between 1978 and 1985 and states that on August 8, 1986, New York sent a copy to Texas of sample pages from such a report. It admits the allegations in the fourth sentence of footnote 7 of paragraph 48. It denies the allegations in the fifth sentence of footnote 7 of paragraph 48. It incorporates by reference here its response to paragraph 6.

49. It admits that the allegations in the first sentence of paragraph 49 accurately state the claims Texas is making in the complaint, but otherwise denies the allegations in that sentence. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the second sentence of paragraph 49. It incorporates by reference here its response to paragraph 6.

50. It denies on information and belief the allegations in the first two sentences of paragraph 50 and states that DTC is not a paying agent for issuers including any of the issuers listed in the Patricia H. Trainor letter attached as Exhibit 3 to the amended complaint. It is without information or knowledge sufficient to form a belief as to the truthfulness of the allegations in the last sentence of paragraph 50.

51. It denies the allegations in the first four sentences of paragraph 51 and incorporates by reference here its response

to paragraph 6. It denies the allegations in the fifth sentence of paragraph 51 except that it admits that it is enforcing the amendments to section 300 of the New York Abandoned Property Law which became effective April 21, 1987. It incorporates by reference here its response to paragraph 6.

52. It denies the allegations in paragraph 52 and incorporates by reference here its response to paragraph 6.

53. It admits that paragraph 53 accurately states the position of Texas, but it otherwise denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

54. Paragraph 54 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

55. The first three sentences of paragraph 55 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies that inclusion of the claim to "Additional Excess Receipts" will not broaden the issues or unduly complicate the pending litigation. It incorporates by reference here its response to paragraph 6.

56. Paragraph 56 states legal argument to which no response is required, but if one is required it denies the allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

57. The first two sentences of paragraph 57 state legal argument to which no response is required, but if one is required it denies the allegations in those sentences. It denies the allegations in the third and fourth sentences of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the fifth sentence of paragraph 57. It is without knowledge or information sufficient to form a belief as to the truthfulness of the allegations in the

remainder of paragraph 57 concerning how each office of a DTC participant operates or whether each DTC participant has offices in each state, but admits that these allegations describe typical branch or regional offices.

58. Paragraph 58 states legal conclusions to which no response is required except that New York denies on information and belief that DTC functions as a paying agent or registrar and it admits that several states have informally supported the Texas motion to intervene. If any further response is required it denies any other allegations in that paragraph. It incorporates by reference here its response to paragraph 6.

59. Paragraph 59 states legal argument to which no response is required, except that New York denies that persons do not make claims for "Excess Receipts," and if any further response is required, it denies the remaining allegations in that paragraph.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the two states is not ripe since Texas failed to file a claim with the New York State Comptroller before commencing this action.

2. Texas has failed to exhaust administrative remedies.

3. Texas' claims are barred by laches and waiver.

4. Texas has failed to state a claim upon which relief can be granted.

5. Under existing law, Texas is not entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that the addresses of the creditors cannot be determined.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner – broker, bank, or securities depository – to the State of Texas under its abandoned property law, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to the State of Texas under its abandoned property law, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its paying agent to the State of Texas under its abandoned property law, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner — broker, bank, or securities depository — to the State of Texas under its abandoned property law, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to the State of Texas under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to the State of Texas under its abandoned property law, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to

recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the amended complaint by the State of Texas or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
of Counsel

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO AMENDED COMPLAINT OF THE STATE OF ALABAMA, HAWAII, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MONTANA, NEVADA, OKLAHOMA, SOUTH DAKOTA, UTAH AND WASHINGTON, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

The State of New York, defendant, by its counsel, for its first amended answer to the complaint in intervention of the States of Alabama, Hawaii, Illinois, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania ("applicants for intervention") says:

1. It admits the allegation in paragraph 1 of the complaint that the applicants for intervention have invoked the original jurisdiction of this Court under article III, section 2 of the Constitution of the United States and section 1251 of title 28 of the United States Code, but denies that this Court has jurisdiction on the ground that the dispute is not ripe since the applicants for intervention failed to to file a claim with the New York State Comptroller before filing their complaint in intervention.

2. It admits the allegation in paragraph 2 of the complaint in intervention, but states that the dispute between Delaware and New York also concerns abandoned property held by New York.

3. It admits the allegations in paragraph 3 of the complaint in intervention.

4. It admits the allegations in paragraph 4 of the complaint in intervention.

5. It admits the allegations in the first sentence of paragraph 5 to the extent that the litigation involves a dispute concerning which state is entitled to the custodial taking of abandoned property ("abandoned dividends"), and denies the remainder. It denies that the definition of "Excess Receipt" in paragraph 5 accurately describes the abandoned dividends. It denies the allegations in the last sentence of paragraph 5 (a) except that it admits the brokers sometimes maintain their funds in a separate account and sometimes maintain them in that account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute. The remainder of paragraph 5(a) states legal conclusions to which no response is required, but if a response is required it denies the allegations.

It denies the allegations in paragraph 5(b) except that it admits that the Depository Trust Company ("DTC"), a trust company incorporated in New York, is a national clearing house for the settlement of trades in corporate and municipal securities and that DTC currently remits abandoned dividends owed

to non-DTC participants to New York. The remainder of paragraph 5(b) states legal conclusions to which no response is required, but if a response is required it denies the allegations.

6. Paragraph 6 states legal conclusions to which no response is required, but if a response is required, it denies the allegations.

7. Paragraph 7 states legal conclusions to which no response is required, but if a response is required it denies the allegations.

8. It denies the allegations in paragraph 8 and states that it is the policy of the State of New York, while protecting the interest of the owners in the abandoned dividends, to use the abandoned dividends for the benefit of all the people of the State.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the states is not ripe since the applicants for intervention failed to file a claim with the New York State Comptroller before commencing this action.

2. The applicants for intervention have failed to exhaust administrative remedies.

3. The claims of the applicants for intervention are barred by laches and waiver.

4. The applicants for intervention have failed to state a claim upon which relief can be granted.

5. Under existing law, the applicants for intervention are not entitled to escheat any abandoned property in the custody of the Comptroller when they have neither alleged nor shown that the addresses of the creditors cannot be determined.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in

their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner – broker, bank, or securities depository – to any of the applicants for intervention under their abandoned property laws, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to any of the applicants for intervention under their abandoned property laws, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its paying agent to any of the applicants for intervention under their abandoned property laws, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that

entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner – broker, bank, or securities depository – to any of the applicants for intervention under their abandoned property laws, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to any of the applicants for intervention under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to any of the applicants for intervention under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the complaint by the States of Alabama, Hawaii, Indiana, Kansas, Louisiana, Montana, Nevada, Oklahoma, South Dakota, Utah and Washington, and the Commonwealths of Kentucky and Pennsylvania or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
of Counsel

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE,

Plaintiff.

STATE OF TEXAS,

Plaintiff-Intervenor,

VS.

STATE OF NEW YORK,

Defendant.

FIRST AMENDED ANSWER BY THE STATE OF NEW YORK TO COMPLAINT IN INTERVENTION OF THE STATES OF CALIFORNIA, MICHIGAN, NEBRASKA, OHIO AND RHODE ISLAND

The State of New York, defendant, by its counsel, for its first amended answer to the complaint in intervention of the States of California, Michigan, Nebraska, Ohio and Rhode Island (the "Designated States") says:

1. It admits the allegation in paragraph 1 of the complaint in intervention that the Designated States have invoked the original jurisdiction of this Court under Article III, Section 2

of the Constitution of the United States and Section 1251 of Title 28 of the United States Code, but denies that this Court has jurisdiction on the ground that the dispute is not ripe since the Designated States failed to file a claim with the New York State Comptroller before commencing this action.

2. It admits the allegations in paragraph 2 of the complaint in intervention, but denies the Designated States' characterization of the Delaware complaint.

3. It admits the allegations in paragraph 3 of the complaint in intervention.

4. It admits the allegations in paragraph 4 of the complaint in intervention.

5. It admits the allegations in paragraph 5 of the complaint in intervention.

6. It admits the allegations in paragraph 6 of the complaint in intervention.

7. It asserts that the allegations in paragraph 7 of the complaint in intervention do not require a response because they characterize the Designated States' contentions, but if a response is required, it answers the subparagraphs of paragraph 7 as follows:

It admits the allegations in the first sentence of 7(a), except denies that the Distributions at issue here include profits, and denies the remainder of the subparagraph, except admits that brokers sometimes maintain unclaimed funds in a separate account until they are paid to the rightful claimant or are remitted to New York at the end of the period required by statute.

It admits the allegations in 7(b), except denies that the Distributions at issue here include profits, denies any allegations incorporated by reference or otherwise from 7(a) which were previously denied, and denies that unclaimed principal and

interest on state and municipal obligations that are held by a financial intermediary, who is not a paying agent, constitute a debt of the issuers of the underlying securities.

8. It denies the allegations in paragraph 8 of the complaint in intervention, except it admits that the unclaimed funds at issue here consist of Distributions paid by issuers (or their agents) to record owners who do not themselves have a claim to such funds because they are owed to another entity, which may or may not be a beneficial owner, which entity is entitled to the funds pursuant to a trade in the underlying securities.

9. It asserts that the allegations in the first sentence of paragraph 9 of the complaint in intervention do not require a response because they characterize the Designated States' contentions, but if a response is required, it denies that the States are entitled to the Allocated Amount. The allegations in the second sentence are too broad and conclusory to formulate a response, but to the extent that one is required, it is without information or knowledge to form a belief as to them.

10. It asserts that the allegations in paragraph 10 of the complaint in intervention do not require a response because they characterize the States' interpretation of various state laws, but if a response is required, it denies the allegations set forth in that paragraph.

11. It denies the allegations set forth in paragraph 11 of the complaint in intervention, and asserts that a separate abandoned property fund is maintained in accordance with the provisions set forth under Section 103(a) of the New York Abandoned Property Law.

AFFIRMATIVE DEFENSES

1. This Court lacks jurisdiction because the dispute between the states is not ripe since the Designated States failed to file a claim with the New York State Comptroller before commencing this action.

2. The claims are barred by laches and waiver.

3. The Designated States have failed to state a claim upon which relief can be granted.

4. Under existing law, none of the Designated States is entitled to escheat any abandoned property in the custody of the Comptroller when it has neither alleged nor shown that it is the State of the creditor's last known address or, if that address cannot be determined from the debtor's books and records, that it is the debtor's state of incorporation.

COUNTERCLAIMS

1. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 in their entirety, New York asserts its right to the custodial taking of the following property, with interest:

(a) each distribution in question in this case which was remitted by an institutional record owner – broker, bank, or securities depository – to any of the Designated States under their abandoned property laws, as to which New York was the jurisdiction where the issuer of the underlying security had its principal executive offices at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(b) each distribution in question in this case which was remitted by the issuer of the underlying security or its agent to any of the Designated States under their abandoned property laws, as to which New York was the jurisdiction where the issuer had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

(c) abandoned intangible property other than unclaimed securities distributions which was remitted by the obligor or its paying agent to any of the Designated States under their abandoned property laws, as to which New York was the jurisdiction where the obligor had its principal executive offices at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the actual owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

2. In the event that the Court adopts the recommendations of the Special Master in his Report dated January 28, 1992 but rejects the principal executive offices of the issuer to locate that entity, or adopts it prospectively only, New York claims, with interest, each distribution in question in this case which was remitted by an institutional record owner – broker, bank, or securities depository – to any of the Designated States under their abandoned property laws, as to which New York was the State of incorporation of the issuer at the time of the escheat or custodial taking, subject to the right of the jurisdiction of the beneficial owner's last known address to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

3. In the event that the Court adopts any one or more of the recommendations of the Special Master in his Report dated January 28, 1992, which singly or in tandem invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions remitted to any of the Designated States under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

4. In the event that the Court rejects the recommendations of the Special Master in his Report dated January 28, 1992 but adopts or formulates any other theory or theories which invalidate retroactively the basis for New York's custodial taking of all or part of the distributions in question in this case, New York claims, with interest, the distributions and any other intangible property remitted to any of the Designated States under their abandoned property laws, which would be owed to New York if the Court's ruling had been in effect at the time of the escheat or custodial taking of such property, subject to the right of the jurisdiction of a superior claimant as defined by the Court to recover the property if and when its law makes provision for the escheat or custodial taking of such property.

WHEREFORE, this Court should enter judgment dismissing the Complaint in Intervention by the Designated States or grant appropriate relief under the Counterclaims.

Dated: New York, New York
December 22, 1992

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT A. FORTE
Assistant Attorney General
Of Counsel

Supreme Court, U.S.
FILED
JUL 1 1993
CLERK

No. 111, Original

In the Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
COMMONWEALTH OF MASSACHUSETTS,
Intervenor,
v.
STATE OF NEW YORK,
Defendant.

COMMONWEALTH OF MASSACHUSETTS' INTRODUCTION TO FIRST AMENDED COMPLAINT AND FIRST AMENDED COMPLAINT

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

George K. Weber*
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

June, 1993

No. 111 Original

In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

COMMONWEALTH OF MASSACHUSETTS,
Intervenor

v.

STATE OF NEW YORK,
Defendant.

COMMONWEALTH OF MASSACHUSETTS'
INTRODUCTION TO FIRST AMENDED COMPLAINT

On March 30, 1993, this Court issued its opinion in the above- referenced case and remanded the case to the Special Master, Thomas H. Jackson ("Special Master"), for further proceedings consistent with the Supreme

Court's opinion and for the preparation of an appropriate decree.

At a status conference in the above-referenced case in Charlottesville, Virginia, on June 2, 1993, the Special Master heard oral argument on the future course of the litigation in this case.

Subsequent to the status conference, the Special Master issued Litigation Management Order No. 6 ("Order"). In the Order, the Special Master allowed "leave to all parties to amend their pleadings now that the Supreme Court has ruled on the issues presented in the prior Report." Litigation Management Order No. 6, dated June 8, 1993, p. 4.

Pursuant to the Special Master's Order, the Commonwealth of Massachusetts ("Massachusetts") hereby files its First Amended Complaint. If, however, the

Court determines that Massachusetts requires leave from this Court to file its First Amended Complaint, Massachusetts hereby requests that the Court grant it leave to file its First Amended Complaint.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

SCOTT HARSHBARGER
ATTORNEY GENERAL

George K. Weber
(Counsel of Record)
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: June 29, 1993

No. 111 Original

In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,

STATE OF TEXAS,
Plaintiff-Intervenor,

COMMONWEALTH OF MASSACHUSETTS,
Intervenor

v.

STATE OF NEW YORK,
Defendant.

COMMONWEALTH OF MASSACHUSETTS'
FIRST AMENDED COMPLAINT

I. JURISDICTION

1. This Court has original jurisdiction over the present parties pursuant to Article III, Section 2, and Section 1251(a) of Title 28 of the U.S. Code.

II. THE PENDING ACTION

2. On May 31, 1988, the Court granted the State of Delaware leave to bring this action against the State of New York regarding which state is entitled to claim and take possession of certain unclaimed intangible property. This unclaimed intangible property consists of dividends, interest, and other distributions arising out of security transactions that are held by securities brokers incorporated in Delaware.

3. On December 12, 1988, the Court appointed a special master for the dispute.

4. On February 21, 1989, the Court granted the State of Texas' motion to file a complaint in intervention that broadened the property in dispute to

include dividends, interest, and other distributions held by Depository Trust Corporation or Cede & Co., which have not been claimed by brokerage and bank members of the Depository Trust Co.

5. Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, Wyoming and the District of Columbia have filed motions to intervene accompanied by

complaints in intervention. Some of these complaints would expand the scope of litigation to include unclaimed intangible property held by brokerage firms, wherever incorporated.

6. On January 28, 1992, the Special Master issued a report with his recommendations to the Supreme Court. The Master recommended that all applications for intervention filed prior to the Supreme Court's final decree be granted.

7. On March 30, 1993, the Supreme Court delivered an opinion in this case ruling that the state in which the intermediary is incorporated has the right to escheat funds belonging to beneficial owners who cannot be identified or located.

8. On March 30, 1993, the Supreme Court granted all pending motions to intervene, including Massachusetts' Motion For Leave to File Complaint in Intervention, and remanded this case to the Special Master.

9. On June 8, 1993, the Special Master issued Litigation Management Order No. 6, allowing plaintiff and any intervening parties to file amended pleadings within 30 days of the Order.

III. THE COMMONWEALTH OF MASSACHUSETTS

10. The Commonwealth of Massachusetts in this action acts by and through the Attorney General of Massachusetts, the official of the Commonwealth of Massachusetts exclusively authorized under the laws of

the Commonwealth to represent the Commonwealth in litigation. Mass. Gen. Laws c. 12, §3.

IV. CLAIM BY THE COMMONWEALTH OF MASSACHUSETTS

11. Under the principles of law enunciated in Texas v. New Jersey, 379 U.S. 674 (1965), and Pennsylvania v. New York, 407 U.S. 206 (1972), the Commonwealth of Massachusetts is entitled to share in the remedy fashioned by the Supreme Court in this case and to claim an undetermined portion of unclaimed distributions held by the State of New York.

12. "Unclaimed distributions" are those distributions held by the State of New York where either the identity of the owners or their last known addresses are unknown.

13. Since about 1975, New York has escheated unclaimed distributions whose beneficial owners are unknown or whose addresses are unknown, from brokerage firms and/or other intermediaries incorporated in Massachusetts.

14. First Boston Corporation and Tucker Anthony, Inc. are two corporations incorporated in Massachusetts that have reported and paid substantial amounts of unclaimed distributions to New York since 1975.

15. Pursuant to the Supreme Court's ruling in this case, and the Massachusetts' Abandoned Property statute, G.L. c. 200A, Massachusetts is entitled, as the state of incorporation of Massachusetts brokerage corporations, to recover from New York all unclaimed distributions that have heretofore been

paid over or transferred to New York by them, including 12% per annum interest on such funds from the date such funds should have been paid or delivered.

16. WHEREFORE, the Commonwealth of Massachusetts requests:

a. that judgment be entered against the State of New York that unclaimed distributions held by Massachusetts' Brokerage Corporations and other intermediaries are subject only to escheat by Massachusetts, under the Massachusetts Abandoned Property Act and other applicable principles of law;

b. a judgment against the State of New York for unclaimed distributions to which the Commonwealth of Massachusetts is

entitled but that have previously been seized by the State of New York, plus interest at the rate of 12% per annum as specified by the Massachusetts Abandoned Property Act G.L. c. 200A §12(e);

c. that New York be directed to pay or deliver to Massachusetts all unclaimed distributions paid or delivered to New York by Massachusetts Brokerage Corporations or other Massachusetts intermediaries, which should have escheated to Massachusetts under its Abandoned Property Act plus interest at the rate of 12% per annum on such funds from the date such funds should have been paid or delivered; and

d. for such further relief as this Court deems just.

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS

SCOTT HARSHBARGER
ATTORNEY GENERAL

George K. Weber
(Counsel of Record)
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: June 29, 1993

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF DELAWARE,

Plaintiff,

STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AND THE DISTRICT OF COLUMBIA,

Plaintiffs In Intervention,

vs.

STATE OF NEW YORK,

Defendant.

On Bill of Complaint

AMENDED COMPLAINT IN INTERVENTION OF THE PLAINTIFF-INTERVENOR STATES OF TEXAS, ARIZONA, COLORADO, CONNECTICUT, IDAHO, MINNESOTA, NEW MEXICO, OREGON, SOUTH CAROLINA, TENNESSEE, WISCONSIN, AND THE COMMONWEALTH OF VIRGINIA

DAN MORALES
Attorney General of Texas
WILL PRYOR
First Assistant Attorney General

MARY F. KELLER
Deputy Attorney General
for Litigation
EDNA RAMÓN BUTTS
Chief, Finance Division
July 8, 1993

DAVID C. MATTAX
COUNSEL OF RECORD
Assistant Attorney General
P. O. Box 12548
Austin, Texas 78711-2548
(512) 463-2018
(512) 477-2348 - Telecopier
Attorneys for Texas and Liason Counsel for Plaintiff-Intervenor States

No. 111 Original

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1992

STATE OF DELAWARE,

Plaintiff,

STATES OF TEXAS, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AND THE DISTRICT OF COLUMBIA,

Plaintiffs In Intervention,

vs.

STATE OF NEW YORK,

Defendant.

On Bill of Complaint

AMENDED COMPLAINT IN INTERVENTION OF THE PLAINTIFF-INTERVENOR STATES OF TEXAS, ARIZONA, COLORADO, CONNECTICUT, IDAHO, MINNESOTA, NEW MEXICO, OREGON, SOUTH CAROLINA, TENNESSEE, WISCONSIN, AND THE COMMONWEALTH OF VIRGINIA

The States of Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee, Wisconsin, and the Commonwealth of Virginia ("States"), Plaintiffs in Intervention, by and through their

Attorneys General, file this Amended Complaint in Intervention and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted the Motion for Leave to File Complaint by Plaintiff State of Delaware ("Delaware") invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which State is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware.

3. On February 21, 1989, the Court granted the Motion for Leave to File Complaint in Intervention by the State of Texas ("Texas"). The Texas Complaint also made subject to

this suit certain additional unclaimed intangible personal property held by the Depository Trust Company.

4. On March 30, 1993, the Court granted the Motions of the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming, and the Commonwealths of Kentucky and Pennsylvania, for Leave to File Complaint in Intervention. These Complaints expanded the scope of this action to include unclaimed intangible property held by all brokerage firms, however incorporated, and by banks and other nonbrokerage firm intermediaries.

5. On March 30, 1993, the Court granted the Motions to intervene of the States of Arizona, California, Colorado, Connecticut, Idaho, Maryland, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee, and Wisconsin, the Commonwealths of Massachusetts and Virginia and the District of Columbia.

6. On June 8, 1993, in Litigation Management Order #6, the Special Master granted leave to all parties to file amended pleadings within thirty days. In accordance with the Order, the States hereby jointly amend their several Complaints filed earlier with the Court.

III. CLAIM OF PLAINTIFFS IN INTERVENTION

7. The States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Distributions" as defined in paragraph 8 below, which comes into being and acquires its character as unclaimed property in the context of securities transactions.

8. "Distributions" consist of unclaimed dividends, profits, principal, interest, and other payments on or with respect to securities, and securities representing any of the foregoing, held or formerly held by brokerage firms, banks, depositories, clearinghouses for the settlement of trades in securities, and other nonbrokerage firm intermediaries (collectively "Intermediaries"). The Distributions constitute unclaimed intangible personal property held or formerly held by

Intermediaries because the Intermediaries do not or did not know the identities or addresses of the beneficial owners of the Distributions and thus do not or did not know to whom to transmit them.

9. New York has taken possession of Distributions as to which it is not entitled and as to which the States are entitled to recover from New York because either (a) under this Court's primary rule the last known addresses of the owners of said Distributions are in their respective States, or (b) if there is no last known address, under this Court's backup rule those Distributions were taken by New York from Intermediaries incorporated in the respective intervenor States.

10. The States further claim entitlement to recover from New York such Distributions taken by New York as to which there is no last known address and which were held by Intermediaries not incorporated in any State, according to equitable principles determined or to be determined by the Court.

11. Alternatively, the States claim entitlement to recover pursuant to any ruling of the Court in this case an undetermined portion of Distributions taken by the State of New York.

PRAYER FOR RELIEF

WHEREFORE, the States pray:

1. That judgment be entered for that portion of the Distributions to which each State is entitled under applicable principles of law, plus prejudgment interest at the prevailing rate; and

2. Such other and further relief as this Court deems just and proper.

Respectfully submitted,
DAN MORALES
Attorney General
WILL PRYOR
First Assistant Attorney General
MARY F. KELLER
Deputy Attorney General
for Litigation
EDNA RAMÒN BUTTS
Assistant Attorney General
Chief, Finance Division

DAVID C. MATTAX
COUNSEL OF RECORD
Assistant Attorney General
State Bar No. 13201600
Finance Division
P.O. Box 12548
Austin, Texas 78711-2548
(512) 463-2018
(512) 477-2348 - Telecopier
Attorneys for Texas and Liason Counsel for Plaintiff-Intervenor States

HON. THEODORE R. KULONGOSKI
Attorney General of Oregon
JACK L. LANDAU
Deputy Attorney General
VIRGINIA L. LINDER
Solicitor General
Counsel of Record
DONALD C. ARNOLD
Chief Counsel
General Counsel Division
WILLIAM R. COOK
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310
(503) 378-4402

T. TRAVIS MEDLOCK
Attorney General of South Carolina
RAY N. STEVENS
Chief Deputy Attorney General
RONALD W. URBAN
Deputy Attorney General
Counsel of Record
Rembert C. Dennis Office Building
P.O. Box 125
Columbia, SC 29214
(803) 737-4430

JAMES E. DOYLE
Attorney General of Wisconsin
BURNEATTA BRIDGE
Assistant Attorney General
Counsel of Record
P.O. Box 7857
Madison, WI 53707-7857
(608) 266-3067

STEPHEN D. ROSENTHAL
Attorney General of Virginia
R. CLAIRE GUTHRIE
Chief Deputy Attorney General
GAIL STARLING MARSHALL
Deputy Attorney General
MARY YANCEY SPENCER
Deputy Attorney General
E. SUZANNE DARLING
Senior Assistant Attorney General
Counsel of Record
101 North Eighth Street
Richmond, Virginia 23219
(804) 225-4486

CHARLES W. BURSON
Attorney General & Reporter of Tennessee
MICHAEL W. CATALANO
Deputy Attorney General
Counsel of Record
450 James Robertson Parkway
Nashville, TN 37219-5025
(615) 741-3499

GRANT WOODS
Attorney General of Arizona
GAIL H. BOYD
Assistant Attorney General
Counsel of Record
1275 West Washington
Phoenix, Arizona 85007
(602) 542-1719

GALE A. NORTON
Attorney General of Colorado
Counsel of Record
RAYMOND T. SLAUGHTER
Chief Deputy Attorney General
TIMOTHY M. TYMKOVICH
Solicitor General
MAURICE KNAIZER
Assistant Attorney General
1100 Sixteenth St., 10th Floor
Denver, Colorado 80202
(303) 620-4610

RICHARD BLUMENTHAL
Attorney General of Connecticut
WILLIAM J. PRENSKY
Assistant Attorney General
Counsel of Record
110 Sherman Street
Hartford, Ct 06105
(203) 566-4899

HUBERT H. HUMPHREY,III
Attorney General of Minnesota
ALAN GILBERT
Assistant Attorney General
Counsel of Record
1100 Bremer Tower
Seventh Pl. & Minnesota Street
St. Paul, MN 55101
(612) 296-3546

TOM UDALL
Attorney General of New Mexico
GURU TERATH SINGHKHALSA
Assistant Attorney General
Counsel of Record
P.O. Drawer 1508
Santa Fe, NM 87504
(505) 827-6083

LARRY ECHOHAWK
Attorney General of Idaho
THEODORE V. SPANGLER, Jr.
Deputy Attorney General
Counsel of Record
LAWRENCE G. SIRHALL, Jr.
Deputy Attorney General
P.O. Box 36
Boise, Idaho 83722
(208) 334-7530

No. 111 Original

In the Supreme Court of the United States

OCTOBER TERM, 1993

FILED
JUL 7 1993
CLERK

STATE OF DELAWARE,

Plaintiff,

STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AND THE DISTRICT OF COLUMBIA,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

On Bill of Complaint

AMENDED COMPLAINT IN INTERVENTION OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WM. BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Plaintiffs in Intervention Alabama, et al.

July 7, 1993

[State Attorneys General Listed Inside]

WILSON • EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

ATTORNEYS GENERAL OF PLAINTIFF-INTERVENOR STATES OF ALABAMA, *ET AL.*

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-2007

ROBERT A. BUTTERWORTH
Attorney General of Florida
PL-01
The Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROBERT A. MARKS
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1282

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

PAMELA FANNING CARTER
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

CHRIS GORMAN
Attorney General of Kentucky
Suite 116
The Capitol
Frankfort, Kentucky 40601
(502) 564-7600

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

MICHAEL E. CARPENTER
Attorney General of Maine
State House, Station No. 6
Augusta, Maine 04330
(207) 626-8800

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

BEST AVAILABLE COPY

JEREMIAH W. NIXON
Attorney General of Missouri
Supreme Court Building
207 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice Complex
25 Market Street
Trenton, New Jersey 08625
(609) 292-4925

HEIDI HEITKAMP
Attorney General of North Dakota
Department of Justice
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

JEFFREY B. PINE
Attorney General of Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

JEFFREY R. HOWARD
Attorney General of New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

MICHAEL F. EASLEY
Attorney General of North Carolina
Department of Justice
P.O. Box 629
2 East Morgan Street
Raleigh, North Carolina 27602
(919) 733-3377

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 4266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

MARK BARNETT
Attorney General of South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

CHRISTINE O. GREGOIRE
Attorney General of Washington
Highways-Licenses Building
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 558-2021

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 111 Original

STATE OF DELAWARE,

Plaintiff,

STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, OREGON, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, TEXAS, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING, THE COMMONWEALTHS OF KENTUCKY, MASSACHUSETTS, PENNSYLVANIA AND VIRGINIA, AND THE DISTRICT OF COLUMBIA,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

On Bill of Complaint

AMENDED COMPLAINT IN INTERVENTION OF THE STATES OF ALABAMA, ALASKA, ARKANSAS, FLORIDA, GEORGIA, HAWAII, ILLINOIS, INDIANA, IOWA, KANSAS, LOUISIANA, MAINE, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OHIO, OKLAHOMA, RHODE ISLAND, SOUTH DAKOTA, UTAH, VERMONT, WASHINGTON, WEST VIRGINIA, AND WYOMING, AND THE COMMONWEALTHS OF KENTUCKY AND PENNSYLVANIA

The States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming, and the Commonwealths of Kentucky and Pennsylvania ("States" or "Alabama, *et al.*"), Plaintiffs in Intervention, by and through their Attorneys General and counsel, file this Amended Complaint in Intervention and allege as follows:

I. JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. PENDING ACTION

2. On May 31, 1988, this Court granted the Motion for Leave to File Complaint by Plaintiff State of Delaware ("Delaware") invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which State is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware.

3. On February 21, 1989, the Court granted the Motion for Leave to File Complaint in Intervention by the State of Texas ("Texas"). The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by the Depository Trust Company.

4. On March 30, 1993, the Court granted the Motions of the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada,

New Hampshire, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming, and the Commonwealths of Kentucky and Pennsylvania, for Leave to File Complaint in Intervention. These Complaints expanded the scope of this action to include certain unclaimed intangible property held by all brokerage firms, wherever incorporated, and by banks and other nonbrokerage firm intermediaries.

5. On March 30, 1993, the Court also granted the Motions of the States of Arizona, California, Colorado, Connecticut, Idaho, Maryland, Michigan, Minnesota, Nebraska, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee and Wisconsin, the Commonwealths of Massachusetts and Virginia, and the District of Columbia, for Leave to File Complaint in Intervention.

6. On June 8, 1993, in Litigation Management Order No. 6 at 8, the Special Master granted leave to all intervening parties to file amended Complaints within 30 days. In accordance with that Order, the States hereby amend their several Complaints earlier filed with the Court.

III. CLAIM OF PLAINTIFFS IN INTERVENTION

7. The States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Distributions" as defined in paragraph 8 below, which comes into being and acquires its character as unclaimed property in the context of securities transactions.

8. "Distributions" consist of unclaimed dividends, profits, principal, interest, and other payments on or with respect to securities, held or formerly held by brokerage firms, banks, depositories, clearinghouses for the settlement of trades in securities, and by other nonbrokerage firm intermediaries (collectively "Intermediaries"). The Distributions constitute unclaimed intangible personal

property held or formerly held by Intermediaries because the Intermediaries do not or did not know the identities or addresses of the beneficial owners of the Distributions and thus do not or did not know to whom to transmit them.

9. New York has taken possession of a portion of these Distributions to which it is not entitled. The States are entitled to recover from New York an undetermined portion of those Distributions either because (a) under this Court's primary rule, the last known addresses of the owners of the Distributions are in their respective States or, (b) under this Court's backup rule, if there is no last known address, the Distributions were taken by New York from Intermediaries incorporated in the respective intervenor States.

10. The States further claim entitlement to recover from New York such Distributions taken by New York as to which there are no last known addresses of the owners and which were held by Intermediaries not incorporated in any State, according to equitable principles determined or to be determined by the Court.

11. Alternatively, the States claim entitlement to recover pursuant to any ruling of the Court in this case an undetermined portion of Distributions taken by the State of New York.

PRAYER FOR RELIEF

WHEREFORE, the States pray:

1. That judgment be entered for that portion of the Distributions to which each State is entitled under applicable principles of law, plus prejudgment interest at the prevailing rate; and

2. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

July 7, 1993

BERNARD NASH
(Counsel of Record)
ANDREW P. MILLER
WM. BRADFORD REYNOLDS
DICKSTEIN, SHAPIRO & MORIN
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700
Attorneys for Plaintiffs in Intervention Alabama, et al.

JIMMY EVANS
Attorney General of Alabama
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

CHARLES COLE
Attorney General of Alaska
State Capitol
P.O. Box 110300
Juneau, Alaska 99811-0300
(907) 465-3600

WINSTON BRYANT
Attorney General of Arkansas
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201
(501) 682-2007

ROBERT A. BUTTERWORTH
Attorney General of Florida
PL-01
The Capitol
Tallahassee, Florida 32399-1050
(904) 487-1963

MICHAEL J. BOWERS
Attorney General of Georgia
Department of Law
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-4585

ROBERT A. MARKS
Attorney General of Hawaii
425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1282

ROLAND W. BURRIS
Attorney General of Illinois
100 West Randolph Street
12th Floor
Chicago, Illinois 60601
(312) 814-2503

PAMELA FANNING CARTER
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204
(317) 232-6201

BONNIE CAMPBELL
Attorney General of Iowa
Hoover Building, 2nd Floor
1300 East Walnut Street
Des Moines, Iowa 50319
(515) 281-5164

ROBERT T. STEPHAN
Attorney General of Kansas
Judicial Center, 2nd Floor
Topeka, Kansas 66612
(913) 296-2215

CHRIS GORMAN
Attorney General of Kentucky
Suite 116
The Capitol
Frankfort, Kentucky 40601
(502) 564-7600

MICHAEL E. CARPENTER
Attorney General of Maine
State House, Station No. 6
Augusta, Maine 04330
(207) 626-8800

JEREMIAH W. NIXON
Attorney General of Missouri
Supreme Court Building
207 W. High Street
Jefferson City, Missouri 65101
(314) 751-3321

FRANKIE SUE DEL PAPA
Attorney General of Nevada
Heroes Memorial Building
Capitol Complex
Carson City, Nevada 89710
(702) 687-4170

ROBERT J. DEL TUFO
Attorney General of New Jersey
Richard J. Hughes Justice
Complex
25 Market Street
Trenton, New Jersey 08625
(609) 292-4925

HEIDI HEITKAMP
Attorney General of
North Dakota
Department of Justice
State Capitol
Bismarck, North Dakota 58505
(701) 224-2210

SUSAN B. LOVING
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105
(405) 521-3921

RICHARD IEYOUB
Attorney General of Louisiana
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804
(504) 342-7013

MIKE MOORE
Attorney General of Mississippi
450 High Street, 5th Floor
Jackson, Mississippi 39205
(601) 359-3680

JOSEPH P. MAZUREK
Attorney General of Montana
Justice Building
215 North Sanders
Helena, Montana 59620-1401
(406) 444-2026

JEFFREY R. HOWARD
Attorney General of
New Hampshire
208 State House Annex
Concord, New Hampshire 03301
(603) 271-3658

MICHAEL F. EASLEY
Attorney General of
North Carolina
Department of Justice
P.O. Box 629
2 East Morgan Street
Raleigh, North Carolina 27602
(919) 733-3377

LEE FISHER
Attorney General of Ohio
State Office Tower
30 East Broad Street
Columbus, Ohio 4266-0410
(614) 466-3376

ERNEST D. PREATE, JR.
Attorney General of
Pennsylvania
1435 Strawberry Square
16th Floor
Harrisburg, Pennsylvania 17120
(717) 787-3391

JEFFREY B. PINE
Attorney General of
Rhode Island
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

JAN GRAHAM
Attorney General of Utah
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-1015

CHRISTINE O. GREGOIRE
Attorney General of Washington
Highways-Licenses Building
Olympia, Washington 98504
(206) 753-6200

JOSEPH B. MEYER
Attorney General of Wyoming
123 State Capitol
Cheyenne, Wyoming 82002
(307) 777-7841

MARK BARNETT
Attorney General of
South Dakota
500 East Capitol
State Capitol Building
Pierre, South Dakota 57501
(605) 773-3215

JEFFREY L. AMESTOY
Attorney General of Vermont
Pavilion Office Building
109 State Street
Montpelier, Vermont 05602
(802) 828-3171

DARRELL V. MCGRAW, JR.
Attorney General of
West Virginia
State Capitol, 26 East
Charleston, West Virginia 25305
(304) 558-2021

Supreme Court, U.S.
FILED
JUL 7 1993
OFFICE OF THE CLERK

No. 111 Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF DELAWARE,

Plaintiff,

STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, et al.,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

ON BILL OF COMPLAINT

AMENDED COMPLAINT IN INTERVENTION OF THE STATE OF CALIFORNIA

DANIEL E. LUNGREN, Attorney General of California
RODERICK E. WALSTON, Chief Assistant Attorney General
THOMAS F. GEDE, Special Assistant Attorney General
YEORYIOS C. APALLAS, Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, CA 94102
Telephone: (415) 703-1687

Attorneys for Plaintiff In Intervention State of California

TABLE OF CONTENTS

		PAGE
I.	JURISDICTION	2
II.	PENDING ACTION	2
III.	CLAIM OF PLAINTIFF IN INTERVENTION	3
PRAYER FOR RELIEF		5

TABLE OF AUTHORITIES

PAGE

Constitution of the United States
Article III, Section 2 2

Title 28, United States Code
Section 1251 2

No. 111 Original

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

STATE OF DELAWARE,

Plaintiff,

STATES OF ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, et al.,

Plaintiffs in Intervention,

v.

STATE OF NEW YORK,

Defendant.

ON BILL OF COMPLAINT

AMENDED COMPLAINT IN INTERVENTION OF THE STATE OF CALIFORNIA

The State of California, Plaintiff in Intervention, by and through its Attorney General files this Amended Complaint in Intervention and alleges as follows:

I.

JURISDICTION

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II.

PENDING ACTION

2. On May 31, 1988, this Court granted the Motion for Leave to File Complaint by Plaintiff State of Delaware ("Delaware") invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which State is entitled to claim and take possession of certain unclaimed intangible personal property held by securities brokerage firms incorporated in Delaware.

3. On February 21, 1989, the Court granted the Motion for Leave to File Complaint in Intervention by the State of Texas ("Texas"). The Texas Complaint also made subject to this suit certain additional unclaimed intangible personal property held by the Depository Trust Company.

4. On March 30, 1993, the Court granted the Motions of the States of Arizona, California, Colorado, Connecticut, Idaho, Maryland, Michigan, Minnesota,

Nebraska, New Mexico, North Carolina, Ohio, Oregon, Rhode Island, South Carolina, Tennessee and Wisconsin, the Commonwealths of Massachusetts and Virginia, and the District of Columbia, for Leave to File Complaint in Intervention.

5. On March 30, 1993, the Court also granted the Motions of the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, Vermont, Washington, West Virginia and Wyoming, and the Commonwealths of Kentucky and Pennsylvania, for Leave to File Complaint in Intervention. These Complaints expanded the scope of this action to include certain unclaimed intangible property held by all brokerage firms, wherever incorporated, and by banks and other nonbrokerage firm intermediaries.

6. On June 8, 1993, in Litigation Management Order No. 6 at 8, the Special Master granted leave to all intervening parties to file amended complaints within 30 days. In accordance with that Order, California hereby amends its Complaint earlier filed with the Court.

III.

CLAIM OF PLAINTIFF IN INTERVENTION

7. California seeks a determination of its rights to certain unclaimed intangible personal property, referred to as "Distributions" as defined in paragraph 8 below, which

comes into being and acquires its character as unclaimed property in the context of securities transactions.

8. "Distributions" consist of unclaimed dividends, profits, principal, interest and other payments on or with respect to securities, held or formerly held by brokerage firms, banks, depositories, clearinghouses for the settlement trades in securities, and by other nonbrokerage firm intermediaries (collectively "Intermediaries"). The Distributions constitute unclaimed intangible personal property held or formerly held by Intermediaries because the Intermediaries do not or did not know the identities or addresses of the beneficial owners of the Distributions and thus do not or did not know to whom to transmit them.

9. New York has taken possession of a portion of these Distributions to which it is not entitled. California is entitled to recover from New York an undetermined portion of those Distributions either because (a) under this Court's primary rule, the last known addresses of the owners of the Distributions are in California or, (b) under this Court's backup rule, if there is no last known address, the Distributions were taken by New York from Intermediaries incorporated in California.

10. California further claims entitlement to recover from New York such Distributions taken by New York as to which there is no last known addresses of the owners and which were held by Intermediaries not incorporated in any State, according to equitable principles determined or to be determined by the Court.

11. Alternatively, California claims entitlement to recover pursuant to any ruling of the Court in this case an undetermined portion od Distributions taken by the State of New York.

12. California realleges all its contentions and request for relief previously made in its Complaint In Intervention as though fully set forth herein.

PRAYER FOR RELIEF

WHEREFORE, California prays:

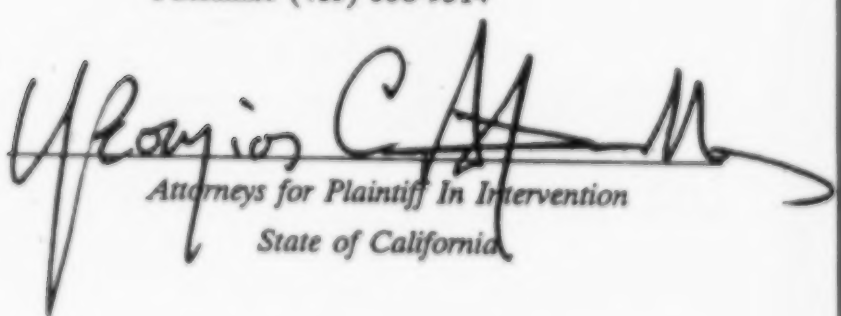
1. That judgment be entered for that portion of the Distributions to which California is entitled under applicable principles of law, plus prejudgment interest at the prevailing rate; and

2. Such other and further relief as this Court deems just and proper.

DATED: July 8, 1993

Respectfully submitted,

DANIEL E. LUNGREN, Attorney General
Of the State of California
RODERICK E. WALSTON,
Chief Assistant Attorney General
THOMAS F. GEDE,
Special Assistant Attorney General
YEORYIOS C. APALLAS,
Deputy Attorney General
455 Golden Gate Avenue, Room 6200
San Francisco, California 94102
Telephone (415) 703-1687
Facsimile (415) 558-9514

By: 

Attorneys for Plaintiff In Intervention
State of California

Supreme Court, U.S.
FILED
JUL 8 1993
OFFICE OF THE CLERK

No. 111 Original

In the

Supreme Court of the United States

OCTOBER TERM, 1992

STATE OF DELAWARE, *Plaintiff,*

STATE OF TEXAS, *et al., Intervenors,*

DISTRICT OF COLUMBIA, *Intervenor,*

v.

STATE OF NEW YORK, *Defendants.*

AMENDED COMPLAINT BY THE DISTRICT OF COLUMBIA

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
One Judiciary Square
441 Fourth Street, N.W.
Washington, D.C. 20001

Tel.: (202) 727-6252
Fax.: (202) 727-0431

JULY 7, 1993

BEST AVAILABLE COPY

In the

Supreme Court of the United States

OCTOBER TERM, 1992

No. 111 Original

STATE OF DELAWARE, *Plaintiff,*

STATE OF TEXAS, *et al., Intervenors,*

DISTRICT OF COLUMBIA, *Intervenor,*

v.

STATE OF NEW YORK, *Defendants.*

AMENDED COMPLAINT BY THE DISTRICT OF COLUMBIA

1. JURISDICTION.

The original jurisdiction of this Court rests on Article III, §2, of the Constitution and on 28 U.S.C. §1251.

2. THE PENDING ACTION.

a. On May 31, 1988, the Court granted the State of Delaware leave to bring this action against the State of New York in order to determine the rights of those states to unclaimed intangible property consisting of dividends, interest, and other distributions arising out of security transactions, the ownership of which is unknown or for which the addresses of the owners are unknown and which is held by securities brokers incorporated in Delaware, but which exceeds the amounts to which the brokers are entitled. 486 U.S. 1030.

b. On December 12, 1988, the Court appointed a special master for the dispute. 488 U.S. 990.

c. On February 21, 1989, the Court granted the State of Texas's motion to file a complaint in intervention that broadened the property in dispute to include unclaimed dividends, interest, and other distributions paid to New York by Depository Trust Corporation or Cede & Co. 489 U.S. 1005.

d. On March 30, 1993, the Court permitted the District of Columbia and all other states to intervene. 113 S. Ct. at 1555.

e. As a result of these interventions, the scope of the litigation has been expanded to include unclaimed securities distributions turned over to New York by all intermediaries, wherever incorporated.

f. Litigation Management Order No. 6, June 8, 1993, permits plaintiff and intervenors to file amended pleadings within thirty days.

3. THE DISTRICT OF COLUMBIA.

The District of Columbia is a government and body corporate for municipal purposes, R.S.D.C. §2, 20 Stat. 102, ch. 180, §1, as amended, D.C. Code §1-102 (1992 repl.), to which Congress has given a large measure of self-government. *See* District of Columbia Self-Government and Governmental Reorganization Act of 1973, Pub. L. 93-198, 87 Stat. 774, as amended.

4. UNCLAIMED DISTRIBUTIONS.

For purposes of this amended complaint, "unclaimed distributions" means dividends, profits, principal, interest, and all other securities distributions received by intermediaries for payment to the beneficial owners of the securities but which have instead been paid since 1972 to New York because the beneficial owners, or their addresses, are unknown.

5. CLAIM BY THE DISTRICT OF COLUMBIA.

Under the District of Columbia's Disposition of Unclaimed Property Act, D.C. Law 3-160, 27 D.C.R. 5150 (1980), as amended, D.C. Code §42-201 *et seq.* (1990 repl.), and under principles of law enunciated in *Texas v. New Jersey*, 379 U.S. 674 (1965), *Pennsylvania v. New York*, 407 U.S. 206 (1972), and *Delaware v. New York*, 113 S. Ct. 1550 (1993), or yet to be enunciated in this action, the District of Columbia is entitled to an undetermined portion of unclaimed distributions collected by New York since 1972 from intermediaries who have no ownership interest in the unclaimed distributions, such as banks, brokers, clearinghouses, and depositories, for one or more of the following reasons:

a. the intermediaries are incorporated in the District of Columbia;

b. the last-known addresses of the beneficial owners of the unclaimed distributions are in the District of Columbia;

c. the intermediaries are federal agencies or are federally chartered or incorporated associations or corporations, including (but not limited to) the Resolution Trust Corporation, the Federal National Mortgage Association, the Government National Mortgage Association, the Pension Benefit Guaranty Corporation, and the Federal Deposit Insurance Corporation;

d. the intermediaries are not incorporated under the laws of any state and are domiciled in the District of Columbia or have their principal executive offices there; or

e. before the litigation concludes, the Court will have adopted other rules of distribution entitling the District of Columbia to a portion of the unclaimed distributons.

6. *Wherefore*, the District of Columbia demands judgment

a. for all unclaimed property collected by New York since 1972 to which the District of Columbia is entitled by its

Disposition of Unclaimed Property Act and other applicable principles of law;

b. interest on such unclaimed property at the rate prevailing as of January 1 and July 1 during the period the unclaimed property has been held by New York since January 1, 1972; and

c. for such further relief as is just.

JOHN PAYTON,
Corporation Counsel

CHARLES L. REISCHEL,
Deputy Corporation Counsel
Appellate Division

LUTZ ALEXANDER PRAGER,
Assistant Deputy Corporation Counsel
Counsel of Record

Office of the Corporation Counsel
One Judiciary Square
441 Fourth Street, N.W.
Washington, D.C. 20001

Tel.: (202) 727-6252
Fax.: (202) 727-0431

JULY 7, 1993

Supreme Court, U.S.
FILED
JUL 8 1993
OFFICE OF THE CLERK

No. 111 Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS, et al.,

Plaintiff-Intervenors,

v.

STATE OF NEW YORK,

Defendant.

AMENDED COMPLAINT OF THE STATES OF MICHIGAN, MARYLAND AND NEBRASKA

DON STENBERG
Attorney General
DALE A. COMER
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2940

Attorneys for the State of Nebraska

JAMES F. FLUG
[Counsel of Record]
LEE E. HELFRICH
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W., Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan, Frank J. Kelley Attorney General, and Maryland, J. Joseph Curran, Jr. Attorney General

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

AUTHORITY FOR THE FILING OF AN AMENDED COMPLAINT..... 1

AMENDED COMPLAINT OF THE STATES OF MICHIGAN, MARYLAND AND NEBRASKA..... 3

I. Jurisdiction..... 3

II. Pending Action..... 3

III. Claim of the Designated States..... 5

Prayer for Relief..... 7

No. 111 Original

In The

Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS, et al.,

Plaintiff-Intervenors,

v.

STATE OF NEW YORK,

Defendant.

AMENDED COMPLAINT OF THE STATES OF MICHIGAN, MARYLAND AND NEBRASKA

AUTHORITY FOR THE FILING OF AN AMENDED COMPLAINT

Pursuant to the June 8, 1993 Order of the Special Master in the above-captioned case, Litigation Management Order No. 6 (hereafter "LMO No. 6"), granting leave to the parties to amend their pleadings, the States of Michigan, Maryland and Nebraska, Plaintiffs in Intervention, file the following Amended Complaint.

On March 30, 1993, the United States Supreme Court issued its decision in *Delaware v. New York*, Orig. No. 111. The Court held that, in resolving disputes among the States over unclaimed securities distributions, the state of

incorporation of the debtor of such distributions controlled for purposes of the backup rule, first announced in *Texas v. New Jersey*, 379 U.S. 674 (1965). However, the Court did not enter judgment, but rather remanded the case to the Special Master for further proceedings, to include, *inter alia*, an opportunity for New York or "any other claimant State" to "offer . . . proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses" for purposes of the Court's primary rule. Slip Op. at 16-17.

After a status conference before the Special Master on June 2, 1993, the Master issued LMO No. 6 under which he, *inter alia*, (1) established an abbreviated discovery schedule, tentatively ending in or about September 1993, in order to permit New York and State Intervenors to test the potential recovery under the primary rule; (2) required New York, by July 8, 1993, to prepare and submit a log providing details concerning its collections of unclaimed distributions and to complete discovery propounded by Delaware in order to determine recoveries under the backup rule; and (3) granted leave to the parties to file Amended Complaints by July 8, 1993. LMO No. 6 at 7.

Pursuant to LMO No. 6, the Designated States file the following Amended Complaint. The Designated States reserve the right to request further leave to amend at a

later date if necessary to conform their pleadings to the results of the discovery contemplated under LMO No. 6.

AMENDED COMPLAINT OF THE STATES OF MICHIGAN, MARYLAND AND NEBRASKA

The States of Michigan, Maryland and Nebraska (hereafter the "Designated States"), by and through their Attorneys General and counsel, hereby Amend their Complaints in Intervention and allege as follows:

I. Jurisdiction

1. The original jurisdiction of this Court is invoked under Article III, Section 2 of the Constitution of the United States and Section 1251 of Title 28 of the United States Code.

II. Pending Action

2. On May 31, 1988, this Court granted the motion of Plaintiff State of Delaware ("Delaware") for leave to file a complaint invoking the original jurisdiction of the Court to resolve a controversy between Delaware and Defendant State of New York ("New York") as to which state is entitled to claim and take possession of certain unclaimed moneys and other intangible property held by securities brokerage firms incorporated in Delaware.

3. On December 12, 1988, Thomas Jackson, Esquire, was appointed Special Master to hear this case.

4. On February 21, 1989, the Court granted the State of Texas' ("Texas") Motion for Leave to File Complaint in

Intervention. The Texas Complaint also made subject to this suit certain additional intangible personal property held by securities brokerage firm and nonbrokerage firm intermediaries.

5. On March 30, 1993, the Court granted the motions of the States of Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, and the Commonwealths of Kentucky, Massachusetts, Pennsylvania and Virginia and the District of Columbia for leave to file complaints in intervention.

6. On March 30, 1993, the Court granted the motions of the States of California, Maryland, Michigan, Nebraska, Ohio, and Rhode Island for leave to file a complaint in intervention. The Complaint of these states covered all unclaimed intangible property held by all brokerage firms, regardless of where incorporated, and by banks and other nonbrokerage firm intermediaries.

7. On March 30, 1993, the Court issued a decision on various exceptions to the January 28, 1992 Report of the Special Master, clarifying the operation of its backup rule for resolving disputes among the states over the escheat or custodial taking of unclaimed intangible property, and remanded the case for further proceedings.

III. Claim of the Designated States

8. The Designated States assert their claims pursuant to their respective unclaimed property laws which provide for the escheat or custodial taking of abandoned or unclaimed tangible and intangible personal property where the owner of the property cannot be found by the holder of the property, and no claim to the property has been made within the applicable dormancy period.

9. The Designated States seek a determination of their rights to certain unclaimed intangible personal property, referred to as "Unclaimed Funds" as defined in paragraph 10 below, which comes into being and acquires its character as unclaimed property in the context of securities transactions.

10. "Unclaimed Funds" consist of unclaimed dividends, profits, principal, interest, and other payments on or with respect to securities, and securities representing any of the foregoing, held or formerly held by brokerage firms, banks, depositories, clearinghouses for settlement of trades in securities, and other nonbrokerage firm intermediaries (collectively "Intermediaries").

11. The Unclaimed Funds claimed herein consist of unclaimed property which comes into being when distributions by the entity initially issuing the shares of stock, bonds, debentures and other securities giving rise to the Unclaimed Funds, are received by Intermediaries who (a) do not themselves have a valid claim to such funds and (b) do not know the identity or location of the current beneficial owners, and thus do not know to whom to transmit the funds. Such Intermediaries do not act on their own behalf, but receive, hold, and/or remit

distributions on behalf of, or for the benefit of, others who have or have had an interest in the underlying security.

12. New York has taken possession of Unclaimed Funds to which it is not entitled.

13. The Designated States are entitled to recover from New York under the Court's primary rule those Unclaimed Funds as to which the last known address of the current or last known creditor of the Intermediary that held those funds, or of the Intermediary's principals or members, is in their respective States.

14. To the extent the primary rule cannot be applied, the Designated States are entitled to recover from New York under the Court's backup rule those Unclaimed Funds held by or on behalf of corporate Intermediaries incorporated in their respective States.

15. The Designated States further are entitled to recover from New York such Unclaimed Funds not payable under Paragraph 13 or 14 according to equitable principles determined or to be determined by the Court.

16. Alternatively, the Designated States: (a) each claim a portion of the Unclaimed Funds determined by an allocation among the states in proportion to the commercial activities, between the brokerage firms or other sellers of securities and customers whose last known addresses were, or should be presumed to have been, in the respective states, which gave rise to the Unclaimed

Funds at issue, or (b) are entitled to recover such additional portions of the Unclaimed Funds taken by New York as they may be authorized to recover.

PRAYER FOR RELIEF

WHEREFORE, the Designated States pray:

1. That New York be restrained and enjoined from demanding or collecting such Unclaimed Funds, and from expending any such sums collected, but presently unencumbered and unspent, which are attributable to Unclaimed Funds being claimed by the Designated States through this action.

2. That judgment be entered for that portion of the Unclaimed Funds to which each State is entitled as a matter of equity and under applicable principles of law, plus prejudgment interest at the prevailing rate.

3. That a reasonable fund be created from Unclaimed Funds presently being held by New York to cover the compensation of the Special Master, his technical, stenographic, and clerical assistants, the cost of printing his reports to this Court, the retention of experts to advise the Special Master as he deems necessary and appropriate and for all other proper expenses. Such funds may be credits against any interest adjudged owing with respect to such Unclaimed Funds.

4. Such other and further relief as this Court deems just and proper.

Respectfully submitted,

DON STENBERG
Attorney General
DALE A. COMER
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509
(402) 471-2940

Attorneys for the State of Nebraska

JAMES F. FLUG
[Counsel of Record]
LEE E. HELFRICH
LOBEL, NOVINS, LAMONT & FLUG
1275 K Street, N.W.,
Suite 770
Washington, D.C. 20005
(202) 371-6626

Attorneys for the States of Michigan, Frank J. Kelley Attorney General, and Maryland, J. Joseph Curran, Jr. Attorney General

FILED
AUG 16 1993

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS, *et al.*,

Plaintiffs-Intervenors,

VS.

STATE OF NEW YORK,

Defendant.

RESPONSE OF THE STATE OF NEW YORK TO MOTION OF THE STATE OF DELAWARE TO STRIKE AMENDED COMPLAINTS

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT FORTE
Assistant Attorney General
Of Counsel

August 18, 1993

No. 111 ORIGINAL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

STATE OF DELAWARE,

Plaintiff,

STATE OF TEXAS, *et al.*,

Plaintiffs-Intervenors,

VS.

STATE OF NEW YORK,

Defendant.

RESPONSE OF THE STATE OF NEW YORK TO MOTION OF THE STATE OF DELAWARE TO STRIKE AMENDED COMPLAINTS

The State of New York hereby responds to the Motion of Plaintiff, State of Delaware, to Strike Amended Complaints in Intervention, filed with the Court on August 9, 1993 ("Del. Motion"). New York agrees with Delaware's arguments that the amended pleadings should be stricken because: (1) the Special Master exceeded his authority by permitting the intervenors to file amended complaints (Del. Motion at 16-19); (2) the intervenors' new claims are contrary to the express terms of the Court's limited remand instructions and thereby result in an impermissible expansion of the case (*id.* at 19-23); and

(3) the amendments are legally insufficient and untimely (*id.* at 25-33). New York does not join in Delaware's motion to the extent only that Delaware claims that its rights have been prejudiced by the proceedings before the Master thus far. *See, e.g.*, Del. Motion at 23-24.

New York filed answers to the intervenors' amended complaints on August 9, 1993, as required by the Master's Litigation Management Order No. 6 at 8 ("LMO"). In the answers, New York raised affirmative defenses which also seek dismissal of the amended complaints, *inter alia*, for legal insufficiency and untimeliness. In addition, prior to filing the answers New York objected to the Master's expansion of the case beyond the terms of the Court's remand instructions as an excess of his authority. *See* New York's Motion to Modify Litigation Management Order No. 6 at 3 (July 28, 1993), referenced in the Del. Motion at 21-22. The Master denied New York's motion in LMO No. 7 at 2 (August 4, 1993).

In its opinion, the Court remanded this case to the Master for the sole purpose of allowing New York to pursue its argument under the primary rule that "reconstruct[ion]" of "the debtor *brokers'* transactions" will lead to "creditor brokers that purchased the underlying securities and were underpaid the distributions." *Delaware v. New York*, 113 S. Ct. 1550, 1561 (March 30, 1993) (per Thomas, J.), (citing Exceptions of Defendant New York 80 (emphasis on the word "brokers" supplied by the Court)). Further, and as Delaware acknowledges, it is possible to construe the remand instruction as according to the intervenors the benefit of New York's reconstruction argument by permitting them to assert primary rule claims in the context of this lawsuit in the same way:

> If New York *or any other claimant State* fails to offer such proof on a transaction-by-transaction basis or to provide some other proper mechanism for ascertaining creditors' last known addresses, the creditor's State will not prevail under the primary rule, and the secondary rule will control. *Id.* [*Pennsylvania v. New York*, 407 U.S.,] at 215, 92 S. Ct., at 2080.

Delaware v. New York, 113 S. Ct. at 1561-62 (emphasis added).

However, there is no conceivable reading of the Court's instructions which would allow the intervenors on remand to assert claims to the remittances of *non-brokerage* entities, specifically banks and depositories such as The Depository Trust Company ("DTC"). The Master's inclusion of banks and DTC within the scope of the remand proceedings violates the Court's express directions. The Court predicated the remand upon New York's contention that the debtor *brokers'* transactions can be reconstructed to identify primary rule creditors. There was no contention from New York or anyone else that such a reconstruction approach could be applied to banks and DTC.

As Delaware correctly argues, the Master's rulings in excess of his jurisdiction have resulted in a gross expansion of this case. Rather than tailoring the case to the narrow confines of the remand, the Master has redesigned the litigation, indulged the intervenors' broad discovery requests relative to banks and DTC, and paved the way for new issues and disputes for this Court to resolve. The posture of this case, under the Master's aegis, is now a far cry from the Court's remand "for proceedings consistent with this opinion and for the preparation of an appropriate decree." 113 S. Ct. at 1562.

Accordingly, New York joins in Delaware's Motion to strike the intervenors' amended complaints. Even if the Court were to deny this relief, to the extent that these pleadings assert claims to the remittances of *non-brokerage* entities (banks and DTC), those claims should be dismissed.

Dated: New York, New York
August 18, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Defendant
120 Broadway
New York, New York 10271
(212) 416-8018

JERRY BOONE
Solicitor General
Counsel of Record

ROBERT FORTE
Assistant Attorney General
Of Counsel

Supreme Court, U.S.
FILED
AUG 23 1993
OFFICE OF THE CLERK

No. 111 Original

In the
Supreme Court of the United States

October Term, 1991

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
COMMONWEALTH OF MASSACHUSETTS,
Intervenor,
v.
STATE OF NEW YORK,
Defendant.

RESPONSE OF INTERVENOR, COMMONWEALTH OF MASSACHUSETTS TO MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

COMMONWEALTH OF MASSACHUSETTS
SCOTT HARSHBARGER
ATTORNEY GENERAL

George K. Weber*
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston , Massachusetts 02108
(617) 727-2200

*Counsel of Record

August, 1993

TABLE OF CONTENTS

	Page
INTRODUCTION	1
DISCUSSION	2
CONCLUSION	12

TABLE OF AUTHORITIES

Cases:

California v. Nevada,
438 U.S. 913 (1978) 8

Davis v. Liberty Mut. Ins. Co.,
871 F.2d 1134 (D.C. Cir. 1989) 7

Delaware v. New York,
113 S.Ct. 36 (1992) 3

Delaware v. New York,
113 S.Ct. 1550 (1993) 3

Foman v. Davis,
371 U.S. 178 (1967) 7, 8

Foremost-McKesson, Inc. v.
Islamic Republic of Iran,
759 F.Supp. 855 (D.C. 1991) . . 8

Technology Consortium v.
Digital Communications,
757 F.Supp 197
(E.D.N.Y. 1991) 9, 10

Texas v. New Jersey,
379 U.S. 674 (1965) 11

Rules:

Fed.R.Civ.P. 15 7

Statutes:

M.G.L. c. 200A, §12 7

No. 111 Original

In the
Supreme Court of the United States
October Term, 1991

STATE OF DELAWARE,
Plaintiff,
STATE OF TEXAS,
Plaintiff-Intervenor,
COMMONWEALTH OF MASSACHUSETTS,
Intervenor
v.
STATE OF NEW YORK,
Defendant.

RESPONSE OF INTERVENOR, COMMONWEALTH OF MASSACHUSETTS, TO MOTION OF PLAINTIFF, STATE OF DELAWARE, TO STRIKE AMENDED COMPLAINTS IN INTERVENTION

INTRODUCTION

The Commonwealth of Massachusetts, by its undersigned counsel, hereby respectfully submits its response to the motion of the State of Delaware to

strike amended complaints in intervention.

Regardless of the Special Master's authority to permit amendment of the complaints in intervention, the Commonwealth of Massachusetts has requested leave to file its amended complaint with this Court and the Court should grant such leave because the amended complaint would not expand the issues in the case, would not prejudice any of the parties, and would promote the efficient and just resolution of this case.

DISCUSSION

On March 31, 1991, the Commonwealth of Massachusetts ("Massachusetts") filed a motion for leave to file complaint in intervention and complaint in

intervention. On October 5, 1992, the Supreme Court allowed Massachusetts' motion for leave to file complaint in intervention. Delaware v. New York, 113 S.Ct. 36 (1992); See Delaware v. New York, 113 S.Ct. 1550 (1993).

The Supreme Court remanded the case of Delaware v. New York, 113 S.Ct. 1550 (1993), to the Special Master, Thomas H. Jackson ("Special Master"), for further proceedings consistent with its opinion. In his Litigation Management Order No. 6, The Special Master allowed all parties leave to amend their pleadings. Litigation Management Order No. 6, p. 4 (June 8, 1993).

On June 29, 1993, Massachusetts filed a First Amended Complaint and an Introduction to First Amended Complaint. In the Introduction to First

Amended Complaint, Massachusetts requests that the Court grant it leave to file its First Amended Complaint if the Court determines that Massachusetts requires such leave. Commonwealth of Massachusetts' Introduction to First Amended Complaint. The Court should deem this request a motion for leave to file the amended complaint.

Massachusetts' First Amended Complaint clarifies and alleges with greater specificity the claims alleged in Massachusetts' complaint in intervention. See First Amended Complaint of Massachusetts (June 29, 1993) ("First Amended Complaint").

The First Amended Complaint does not add any new claims or theories that were not present in the original complaint. See Complaint of Massachusetts (filed March 31, 1991).

Massachusetts' original complaint in intervention requested relief pursuant to any remedy fashioned by the Supreme Court in the case and also asserted rights to an undetermined portion of the unclaimed distributions held by the State of New York ("New York"). Complaint of Massachusetts ¶8. See also Motion of the Commonwealth of Massachusetts for Leave to File Complaint in Intervention ¶7 (filed March 31, 1991). In its prayer for relief, Massachusetts requested a judgment against New York for unclaimed distributions to which Massachusetts was entitled but which had been previously seized by New York, plus interest. Complaint of Massachusetts ¶9.

Massachusetts' First Amended Complaint requests the same relief. First Amended Complaint of Massachusetts ¶11 (June 29, 1993). The First Amended Complaint clarifies the unclaimed distributions that are at issue by adding a definition of "unclaimed distributions" that was not present in the original complaint. First Amended Complaint ¶12. In addition, the amended complaint names two Massachusetts-incorporated brokerage firms that paid substantial amounts of unclaimed distributions to New York. First Amended Complaint ¶14.

The First Amended Complaint further specifically requests a judgment against New York for unclaimed distributions to which Massachusetts is entitled but that

have been seized by New York, plus interest at the rate of 12% (twelve percent) per annum as specified by the Massachusetts Abandoned Property Act G.L. c. 200A, §12(e). First Amended Complaint ¶16.

If leave to file Massachusetts' amended complaint is required, the Court should grant such leave. As stated in Fed. R. Civ. P. 15(a) and reiterated by this Court, leave to amend a complaint "shall be freely given when justice so requires." Foman v. Davis, 371 U.S. 178, 182 (1962). See Davis v. Liberty Mut. Ins. Co., 871 F.2d. 1134, 1136-37 (D.C. Cir. 1989) ("It is common ground that Rule 15 embodies a generally favorable policy towards amendments."). In the absence of bad faith, undue

delay, dilatory motive, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party or futility of the amendment, the Court should allow leave to amend the complaint. Foman, 371 U.S. at 182; Foremost-McKesson Inc. v. Islamic Republic of Iran, 759 F. Supp. 855, 857 (D.D.C. 1991); See also California v. Nevada, 438 U.S. 913 (1978) (allowing motion for leave to file an amended complaint in original jurisdiction case).

In keeping with the liberal amendment standard, the District Court for the Eastern District of New York allowed a motion to amend a complaint where the plaintiff did not seek to add any new or additional claims and merely sought to plead claims with more

specificity. Technology Consortium v. Digital Communications, 757 F. Supp. 197, 199 (E.D.N.Y. 1991).

Massachusetts' First Amended Complaint was filed in good faith in order to clarify and allege in greater detail the general claims made in the original complaint and was filed only a few months after the Court allowed its motion to file a complaint in intervention. Allowing the amendment would not prejudice any party to the proceedings because it does not add any new claims or theories that were not present in the original complaint.[1/]

[1/] Discovery will proceed as it has been without any additional disruption or delay caused by the First Amended Complaint.

See Technology Consortium v. Digital Communications, 757 F. Supp. at 199.

Unlike the amended complaints filed by other Intervenors[2/], Massachusetts' First Amended Complaint states a claim under the "backup rule" enunciated in

---

[2/] See Amended Complaint in Intervention of Plaintiff-Intervenor States of Texas, Arizona, Colorado, Connecticut, Idaho, Minnesota, New Mexico, Oregon, South Carolina, Tennessee, Wisconsin, and the Commonwealth of Virginia (filed July 7, 1993); Amended Complaint in Intervention of the States of Alabama, Alaska, Arkansas, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Utah, Vermont, Washington, West Virginia, Wyoming, and the Commonwealths of Kentucky and Pennsylvania (filed July 7, 1993); Amended Complaint in Intervention of the State of California (filed July 9, 1993); Amended Complaint by the District of Columbia (filed July 8, 1993); and Amended Complaint of the States of Michigan, Maryland and Nebraska (filed July 8, 1993).

Texas v. New Jersey, 379 U.S. 674 (1965) only and would not expand the scope of the proceedings before this Court.

Justice requires that leave to file the amended complaint be allowed because a more definite statement of Massachusetts' claim will facilitate the resolution of the case against New York. Therefore, even if the Court were to decide that the Special Master has exceeded the scope of his authority in allowing all parties leave to amend their complaints and that leave to file an amended complaint is required, the Court should allow Massachusetts' leave to file its amended complaint because the amended complaint raises no new claims, will not prejudice the defendant or any other party to this action, and

will provide a more definite statement of Massachusetts' claim.

CONCLUSION

Delaware's motion to strike amended complaints in intervention should be denied as to Massachusetts' amended complaint. In the alternative, the Commonwealth of Massachusetts requests that this Court allow Massachusetts' request for leave to file its amended complaint.

COMMONWEALTH OF MASSACHUSETTS

SCOTT HARSHBARGER
ATTORNEY GENERAL

By: _____

George K. Weber
Counsel of Record
Pasqua Scibelli
Assistant Attorneys General
One Ashburton Place
Boston, MA 02108
(617) 727-2200

Dated: August 20, 1993